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THE ICEBOX COMETH: A FORMER CLERK'S VIEW OF THE PROPOSED NINTH CIRCUIT SPLIT

Jennifer E. Spreng*

Abstract: Most academic commentators oppose splitting the Ninth Circuit Court of Appeals. They argue that the court's size is a virtue and either deny that the court has size-related problems, such as workload, consistency, and reversal rate, or claim that a split would not address these problems. The U.S. Congress, however, is less sure. It has appointed the Commission on Structural Alternatives for the United States Courts and asked it to study a possible Ninth Circuit split. This Article provides an "insider's view," that of a former elbow clerk, and reveals that a split would significantly decrease the court's workload and increase its consistency and predictability. The so-named "icebox split," which would sever Alaska, Idaho, Montana, Oregon, and Washington from the Ninth Circuit and create a new Twelfth Circuit, would best improve the administration of justice without violating other important policies governing circuit boundary setting for a definable group of Americans knit together by common interests. This Article concludes that the Ninth Circuit should be split and a new circuit created from the icebox states.

Chief Inspector Morse: What are the twin bases for successful detection, Lewis?

Sergeant Lewis: Confession and information, sir.

Chief Inspector Morse: Well done. Now, what we need is information. And who are the best informed people in any [Oxford] college?

(Sergeant Lewis shakes his head)

Chief Inspector Morse: The Scouts, Lewis. They put the drunks to bed; they clean up the vomit; they wake the sober, whether singly or in pairs. They are discrete, maternal, devoted, exploited, and they know everything.¹

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1. *The Last Enemy* (British Broadcasting Corp. 1989) (starring John Thaw and based on characters created by novelist Colin Dexter).

I. INTRODUCTION

Since the early 1940s, many Pacific Northwesterners have been searching for a way to sever their region from the huge Ninth Circuit Court of Appeals.² In the fall of 1997, Congress passed a bill to create a Commission on Structural Alternatives for the Federal Courts of Appeals³ to study realignment of the appellate courts in the wake of the most concerted congressional effort to split the Ninth Circuit Court of Appeals since the 1970s.⁴ Although every Congress in this decade has considered splitting the Ninth Circuit, no such bill had passed either house until 1997 when the Senate backed a plan in an appropriations bill rider to create a Twelfth Circuit.⁵ That circuit would have included Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington. California, Guam, Nevada, and the Northern Marianas would have remained in the Ninth Circuit.⁶

Although Congress ultimately created the Commission instead of restructuring the Ninth Circuit, the Commission's work was not intended to be, nor has it been, a stalling tactic or whitewash job. In fact, its executive director, University of Virginia Professor Daniel J. Meador, is the co-author of a book that twenty years ago endorsed creating the most sensible Twelfth Circuit so far proposed: the Icebox Circuit of Alaska, Idaho, Montana, Oregon, and Washington.⁷ Circumstances may have changed in the past two decades,⁸ but whatever the Commission

2. See Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 100 (1994).

3. Chief Justice William Rehnquist appointed the Commission's members, which include former Supreme Court Justice Byron White, Sixth Circuit Judge Gilbert S. Merritt, Ninth Circuit Judge Pamela Rymer, U.S. District Court Judge from Arizona William Browning, and former American Bar Association President N. Lee Cooper. *Panel Chosen to Study Federal Appeals Court System*, Assoc. Press, Dec. 19, 1997, available in 1997 WL 4897505.

4. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 305, 111 Stat. 2491, 2492 (1997).

5. See Carl Tobias, "Judicial Gerrymandering" Would Split the 9th Circuit, S.F. Exam., Aug. 11, 1997, at A13. The House ultimately rejected the idea for 1997, and the two houses of Congress compromised on a scheme to create the Commission.

6. *Id.*

7. Paul D. Carrington et al., *Justice on Appeal* 203 (1976).

8. In 1975, the Commission on Revision of the Federal Court Appellate System (Hruska Commission) claimed that an appellate court might not be able to function with more than nine judges. That view turned out to be wrong. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975) [hereinafter *Hruska Report II*].

ultimately concludes, it is apparent that the Ninth Circuit's structure is finally on the table, if not the chopping block.

The Tentative Draft Report the Commission released on October 7, 1998 confirms it.⁹ The Commission proposed that the Ninth Circuit be reorganized into "three regionally based adjudicative divisions" of at least seven active judges.¹⁰ The Northern Division would consist of the icebox states.¹¹ The Middle Division would consist of the Districts of Northern and Eastern California, Hawaii, Nevada, Guam and the Northern Marianas Islands.¹² The Southern Division would include Arizona and the Districts of Central and Southern California.¹³ Each Ninth Circuit judge would be assigned to one of the regional divisions. Although not all of the judges assigned to each division would actually reside in the area, a majority of each division's judges would be resident there.¹⁴ Decisions in one division would not bind any other, and each division would have its own internal en banc procedure.¹⁵ To resolve decisional conflicts between the division, the Commission proposes a "Circuit Division" of the Chief Judge, and the presiding judge plus one other circuit judge from each regional division.¹⁶ The circuit-wide en banc process would be abolished.¹⁷ After receiving public comment on the tentative draft report proposals, the Commission will submit a final report to the President and Congress on December 17, 1998.¹⁸

The Commission came as close to the edge of the circuit-splitting canyon as it could without actually falling over. Its proposal recognizes the regional integrity of the icebox states and tries to fashion a remedy taking into account many problems the Ninth Circuit faces specifically

9. See Commission on Structural Alternatives for the Fed. Courts of Appeals, *Tentative Draft Report* (Oct. 1998) (visited Oct. 10, 1990) <<http://app.comm.uscourts.gov.report/appstruc.pdf>>.

10. *Id.* at 39.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 41.

15. *Id.*

16. *Id.* at 41-42.

17. *Id.* at 42.

18. Press Release from the Commission on Structural Alternatives for the Federal Courts of Appeals, *Appellate Study Commission Issues Draft Report for Public Comment*, Oct. 7, 1998 (on file with author).

due to its size, such as certain types of work,¹⁹ consistency and predictability,²⁰ collegiality,²¹ and regionalization.²² For those very reasons, the Commission should consider recommending in its final report that its Northern Division, the icebox states, be fashioned into their own circuit. If not, Congress would still do well to consider the Commission's views very carefully, because, as this Article will show, there is much to recommend them. Then, Congress should take the step the Commission felt it could not, and split the icebox states from Ninth Circuit altogether.

As a matter of pure congressional politics, the Ninth Circuit is probably at greatest risk of dismemberment since it took shape in 1891.²³ Slade Gorton of Washington and Conrad Burns of Montana, along with other northwestern Republicans in the Senate, pushed for a split for years, but the recent Republican takeover of Congress and Senators Burns and Gorton's seniority have placed their concerns on the national agenda.²⁴ Importantly, the powerful senior senator from Alaska and appropriations committee chairman, Ted Stevens, grabbed the leadership of the Ninth Circuit split movement after the court issued an opinion that

19. *Id.* at 27, 42–44 (noting that Ninth Circuit judges are currently hampered in producing high-quality work because they do not have time to read all of court's decisions and that en banc burden needs to be reduced "to a more manageable level"); *cf.* discussion *infra* Part III.A (arguing that splitting Ninth Circuit would measurably decrease workload caused by en banc cases, death penalty cases, and review of court's opinions for judges in both new Twelfth Circuit and new Ninth).

20. *Tentative Draft Report, supra* note 9, at 27, 42–44 (noting that smaller adjudicative units may produce more consistent and predictable circuit law because it is easier for judges to monitor circuit's opinions and it is easier for local bar to "know" court); *cf.* discussion *infra* Part III.B (noting that limited en banc procedure, "unknown" bench, number of "outlier views" on Ninth Circuit, and attractiveness of "rolling the dice" on appeal are all causes or effects of Ninth Circuit's lack of consistency and predictability that are function of its size).

21. *Tentative Draft Report, supra* note 9, at 38–39 (noting that "consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for the kind of close, continual, collaborative decisionmaking that 'seeks the objective of as much excellence in a group's decision as its combined talents, experience, and energy permit'"); *cf.* discussion *infra* Part III.C (stating that Ninth Circuit has collegiality problems that two smaller circuits could alleviate).

22. *Tentative Draft Report, supra* note 9, at 44–45 (noting that divisional arrangement within circuit would "restor[e] a sense of connection between the court and the regions within the circuit" while still "respect[ing] the character of the West as a distinct region"); *cf.* discussion *infra* Part III.D (arguing that regional polarization on Ninth Circuit threatens legitimacy of court and impairs court's ability to perform its appropriate federalization function).

23. The Ninth Circuit was formed in 1891 and Alaska, Arizona, Hawaii, and Guam were added later. *See Baker, supra* note 2, at 76.

24. *See, e.g., Ann Donnelly, Fairness Demands Split of Ninth Circuit Appeals Court*, *Columbian*, Aug. 3, 1997, at B9.

confounded many Alaskans' understanding of natives' claims on the state's land.²⁵ All this occurred against the backdrop of yet another Supreme Court term in which the high court reversed decisions in more than ninety-six percent of the Ninth Circuit cases it heard.²⁶ The only real question left may be whether the powerful Republican senators from the northwest can convince their equally powerful Republican House colleagues from California to go along with a split plan.

Perhaps they can. The Ninth Circuit faces numerous challenges due to its size and extraordinary workload, and some of these challenges have degenerated into real problems. The circuit currently has twenty-two active judges of the twenty-eight authorized by statute,²⁷ and they are assisted by sixteen senior judges. By contrast, the next largest circuit, the Fifth Circuit, has its full complement of seventeen authorized active judges and a mere four senior judges. The Ninth Circuit's vastness increases workload, because the larger a circuit's population, the more cases it will produce that require all of the judges' attention. Too many judges and cases eliminate economies of scale and create administrative inefficiency. The more judges, the less opportunity each judge will have to sit on a panel with each other judge, making collegiality and sometimes even civility difficult. Such a large court begins to look and act more like a legislature. Finally, the court's jurisdiction sweeps over at least two definable geographic regions, pitting two very different cultural and legal outlooks against each other in what appears to be a battle for domination. The Ninth Circuit displays all of these unattractive

25. *Alaska ex rel. Yukon Flats Sch. Dist. v. Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 118 S. Ct. 948 (1998) (concluding that "Indian Country" existed in Alaska). Most Alaskans believed that the Alaska Native Claims Settlement Act (ANCSA) had abolished Indian Country in the state. The decision prompted both Ted Stevens and Energy Committee Chairman Frank Murkowski to take on a higher profile in the split debate. Stevens's interest is critical because his role as Senate Appropriations Committee chairman gives split backers the opportunity to trade a vote with every senator who wants spending in his state. In fact, Stevens pushed the split package through as a rider to one of his committee's bills. See David Whitney, *9th Circuit Split Clears Roadblock*, Anch. Daily News, July 25, 1997, at A1; see also Carol Ostrom, *Fuming Senators Ready to Carve Up 9th Circuit*, Seattle Times, Nov. 2, 1997, at A1.

26. The Ninth has had a disproportionately high reversal rate for almost 15 years with only a brief respite in the early 1990s. William Carlsen, *Frontier Justice*, S.F. Chron., Oct. 6, 1996, available in 1996 WL 3228822. The Supreme Court reversed only two-thirds of all the cases it heard in 1996-97. Bob Egelko, *Senate Short-Circuits 9th with Vote to Split Court*, Seattle Post-Intelligencer, Aug. 18, 1997, at B1.

27. 28 U.S.C. § 44 (1994).

attributes, and they all arise from a structural deficiency. In short: “the circuit is too large and has too many cases.”²⁸

To say that the Ninth Circuit has problems is not to say they are of the judges’ making, however. What is quite remarkable about the Ninth Circuit is how the judges have papered over their circuit’s structural deficiencies with goodwill. Every time a Ninth Circuit judge drafts his own electronic mail to his colleagues, instead of having a clerk do it, he minimizes the “cocoon problem.” Every time a judge decides not to call for en banc rehearing of a case just because she believes the case is completely wrong, she minimizes the workload problem.²⁹ Every time a judge struggles a little longer with the multiple precedents controlling immigration and social security disability issues, he minimizes the consistency problem. Every time a judge makes an extra effort to go out to lunch or dinner with another judge she does not know well, she helps solve the collegiality problem. Unfortunately, there are limits to the structural problems goodwill can mitigate; at some point, there are only structural solutions to structural problems. For this reason, the icebox cometh.

Opponents of the split claim that split backers have the “burden of persuasion” in this debate.³⁰ Admittedly, pointing out that the circuit is structurally deficient does not answer the question of whether two smaller circuits is the answer to the problem. Hopefully, the nation’s decision on the split will be based on a balancing of costs and benefits. The difficulty will be determining how to identify the costs and benefits and how much they weigh. Professor Arthur Hellman, perhaps the top expert on the internal administration of the Ninth Circuit has suggested a way of analyzing the merits of arguments in favor of the split: evaluate whether (1) serious problems exist that warrant change, (2) the proposed changes will cure or substantially mitigate the problems, and (3) the proposed changes will be less undesirable than the problems being remedied.³¹ Hellman’s proposed analysis is worth bearing in mind, but it is important to keep our eyes on the bottom line: whether the Ninth

28. Donnelly, *supra* note 24, at B9 (quoting Ninth Circuit Judge Andrew J. Kleinfeld).

29. En banc rehearing on the Ninth Circuit is the process of rehearing a case by 11 judges after a three judge-panel has already issued a decision. 9th Cir. R. 35-3. On all other courts, en banc rehearing is done before the full court. 28 U.S.C. § 46(c) (1994).

30. See, e.g., Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 Mont. L. Rev. 291, 295 (1996).

31. Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261, 263 (1996).

Circuit has problems we cannot live with and whether splitting the circuit would address those problems in a meaningful way.³² Split backers can meet that burden without difficulty.

In fact, opponents of the split have the burden of persuasion exactly backwards. Burdens of persuasion have little meaning in the context of a policy debate in Congress; after all, Congress is not a court. Most split opponents underrate the significance of the fact that many of the elected representatives from several northwestern states have consistently supported a split in this decade and that their growing interest in a split probably reflects the views of a majority of their constituents.³³ The popularity of a policy alone is no hallmark of its virtue, but the United States is a democracy. If the people of several northwestern states want a separate circuit, that support states a *prima facie* case in favor of a split. It does not matter if their reasons seem “silly.” The courts are merely another arm of the government, and the government exists for the benefit of people. The real burden is on the opponents of the split: Can they persuade us that the split these people want is a bad idea or that their reasons for maintaining the current borders are more worthy than the reasoning of split supporters? They cannot succeed in carrying that burden.³⁴

Part II of this Article starts by exploring the split proposals actually on the table, evaluating them based on oft-applied criteria, and concludes that a legislative package of the icebox configuration of northwest states,

32. To take what I believe to be a relevant example, published opinions provide some evidence that the Ninth Circuit is currently having collegiality problems. *See infra* Part III.C. These problems may not be worse than in other circuits, but that is no reason not to improve matters in the Ninth Circuit if it can be done by splitting the circuit without too much disruption. It is also reasonable to conclude either that due to the size of the court, it will be much more difficult to overcome these problems within the current structure or that these problems may become intractably worse in the future. In other words, structural considerations may or may not have caused the problem, but they have made collegiality problems extremely difficult to solve. Splitting the circuit, which is already a statistical outlier from a size perspective, might mitigate or solve the problem. It is irrelevant that smaller circuits may have collegiality problems as well because they could be due to completely different reasons. Maybe the judges on the smaller circuit are simply hard to get along with. A different solution, or perhaps no solution, should be addressed to that problem.

33. At least it is not an issue where their disagreement with their elected representatives is so profound as to cause them to turn the rascals out!

34. As Justice Anthony Kennedy has written to the Commission on Structural Alternatives, “A court which seeks to retain its authority to bind nearly one-fifth of the people of the United States by the decisions of its three-judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion.” *Letter from Justice Anthony Kennedy to Justice Byron White* (Aug. 17, 1998) (visited Sept. 24, 1998) <[http:// app.comm.uscourts.gov/hearings/submitted/pdf/kennedy/pdf](http://app.comm.uscourts.gov/hearings/submitted/pdf/kennedy/pdf)>.

perhaps sweetened with additional judges for the states left behind, is intrinsically the most attractive proposal for change. Part III identifies the “real” problems of the Ninth Circuit and shows how the icebox configuration would solve them, therefore carrying the burden split opponents assign to split backers. Part IV answers many of the arguments against the split, demonstrating that split backers cannot carry what is actually their burden in the court of public opinion. The Article concludes that the icebox split is the best way to improve the administration of justice for as many people as possible in the short and medium terms and to provide the most flexible base from which additional realignment can occur in the future.

My conclusions run counter to the work of many top academic commentators.³⁵ Their impressive and almost-scientific studies of court administration cast doubt on the more intuitive arguments in favor of splitting the circuit. Our time in history is one in which decisionmakers often put greater stock in scientific explanations of social phenomena than in the evidence of our own eyes. But there are more ways to study government institutions than just regression analysis. As many respected political scientists know, one excellent way to understand how a government institution and its constituent members behave is to become part of that institution.³⁶ What better way is there to become part of the

35. See, e.g., Baker, *supra* note 2, at 218–20; Hellman, *supra* note 31; Carl Tobias, *The Impoverished Idea of Circuit Splitting*, 44 Emory L.J. 1357 (1995).

36. See, e.g., Richard Fenno, *The Making of a Senator: Dan Quayle* at ix (1989). This book was part of a major project by University of Rochester Professor Richard Fenno to describe and account for the relationship between a senator’s work at home, campaigning, and his work in Washington, governing. Fenno explains:

My vantage point has been the view “over the shoulder” of Senator Quayle and his staff. My perspective has been their perspective. I have not tried to watch or talk to other relevant actors in the events described herein—although I have come across some of them in the normal course of my research. And I have relied, at several points, on the accounts and judgments of interested political reporters—the media scorekeepers.

Id. My vantage point is Fenno’s, with a twist. Not only did I look over the shoulder, literally as well as figuratively, of a relevant actor on the Ninth Circuit—Judge Andrew J. Kleinfeld—but I actually became part of the court administration process as his elbow clerk.

I have worked hard to avoid allowing my general observations about how the Ninth Circuit or a judge’s chambers operates to degenerate into mere descriptions of how Judge Kleinfeld’s chambers operates. Observing the court at work teaches that *every judge is different*, which makes generalizations quite difficult to make.

In a number of cases, my experience as a clerk for Judge Kleinfeld was different from what I believe to be the average experience for clerks (which no clerk may ever actually experience); in other cases, our chambers was in the middle of the mainstream. Clerks share insights about their chambers and the clerking experience. I observed the work that came into our office from other

Ninth Circuit, and therefore to understand the issues swirling about the split debate, than to become a Ninth Circuit clerk? After all, the staff “know[s] everything,”³⁷ right? Even if that is not *quite* true, comparing the conventional wisdom as stated in the many academic studies of the Ninth Circuit’s institutional behavior with a first-hand view of the circuit at work teaches once again that “things are seldom what they seem” to outside observers.³⁸

II. WHAT’S ON THE TABLE? THE VARIOUS PROPOSED SPLITS

A. *Background*

The Ninth Circuit currently includes more states than any other of the eleven regional circuits: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas, Oregon, and Washington.³⁹ Unless Congress decides to embark on a more extensive reorganization of the appellate courts,⁴⁰ the multiple circuits that will result from a Ninth Circuit split or reorganization will include some configuration of these states. A considerable amount of opposition to splitting the circuit over the years has centered around specific configurations for the new Twelfth Circuit.⁴¹ Therefore, it is useful to take a look at some of those proposals

chambers, and I had the opportunity to soak in the culture of the court. Obviously, personal experience plays a role in my views, but the opportunity to observe judges at work does so as well.

37. *The Last Enemy*, *supra* note 1.

38. *HMS Pinafore* (Gilbert & Sullivan 1878).

39. See 28 U.S.C. § 41 (1994). The D.C. Circuit and the Federal Circuit are more like the subject matter circuits Professor Daniel Meador has proposed. Daniel Meador, *Struggling Against the Tower of Babel*, in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 195, 200–01 (Arthur Hellman ed., 1990).

40. There are good reasons not to reorganize the federal courts beyond dividing the Ninth Circuit, as the Hruska Commission realized. The Fifth Circuit split of 1981 proved that it is possible to preserve the stability of stare decisis, even when a circuit splits. See Baker, *supra* note 2, at 68–69. That would be much more difficult if Congress reorganizes all the circuit borders. Further, the Hruska Commission found loyalty with the judiciary and the bar for the current circuits. Commission on the Revision of the Federal Court Appellate System, *Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals*, 62 F.R.D. 223, 228 (1973) [hereinafter *Hruska Report I*]. As a practical matter, Congress has never seriously considered a complete reorganization of the circuits and is unlikely to embark on that sea in the near future. See Baker, *supra* note 2, at 216–18; Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 Mont. L. Rev. 245, 259 (1996).

41. See, e.g., Hug, *supra* note 30, at 307; Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. Rev. 583, 591–94 (1997).

to consider a threshold question: Would a split be very attractive as a practical matter?

Any modern discussion of federal appellate court structures and internal reforms begins with the mid-1970s work of the Commission on Revision of the Federal Court Appellate System, or the "Hruska Commission," nicknamed after its chairman, Senator Roman Hruska. The Hruska Commission's two reports, one on circuit court boundaries,⁴² and the other on internal reforms,⁴³ cast a long shadow over the legislative debate on court administration that lingers today.⁴⁴ The Commission's primary contributions were its proposals that the two largest circuits, the Fifth and the Ninth, be split,⁴⁵ numerous judgeships be added,⁴⁶ and the following criteria be used in evaluating future proposed circuit splits:

- a. Circuits should include at least three states;
- b. No circuit should have only one state;
- c. No circuit should be created that would immediately require more than nine active judges;
- d. Circuits should contain states with a diversity of population, business and interests, in order to maintain the national character of the court;
- e. Realignment should involve as little dislocation of circuit boundaries as possible, with dislocation being justified by other criteria;
- f. No circuit should contain noncontiguous states.⁴⁷

42. *Hruska Report I*, *supra* note 40.

43. *Hruska Report II*, *supra* note 8.

44. Many government and private studies of the federal courts followed those of the Hruska Commission, but none matches it for the fertility of the ground it broke in the court administration debate, the number of recommendations implemented, and the prescience of its warnings. For a summary of these efforts, see Baker, *supra* note 2, at 37-43. According to Baker, not many of the Hruska Commission's recommendations were in fact implemented, but the Commission did better than those that followed. *Id.* The Fifth Circuit was ultimately split in the formulation the Commission had proposed. *See, e.g.*, Tobias, *supra* note 35, at 1362. Many of its efficiency proposals were tried and Congress adopted the Commission's primary strategy of adding judges to cope with workload, and all split proposals are still judged first by the Hruska Commission's criteria.

45. *Hruska Report I*, *supra* note 40, at 230-37. Several giants of the legal academy endorsed the Hruska Commission's circuit splitting proposals. *See, e.g.*, Carrington, *supra* note 7, at 202-03.

46. *Hruska Report I*, *supra* note 40, at 230.

47. *Id.* at 231-32.

Congress did not initially follow the Commission's advice. Congress first responded to the two split proposals by permitting circuits with more than fifteen judges to organize themselves into administrative units and perform their en banc functions with fewer than all their judges, instead of splitting either circuit.⁴⁸ That solution turned out to be unsatisfactory to the Fifth Circuit. In the 1970s, the Fifth Circuit was experiencing an unprecedented explosion in caseload due mostly to civil rights filings.⁴⁹ It followed the mandate of the new law by reorganizing itself into administrative units, but it could not bear to sacrifice its full-court en banc procedure for fear of destroying the law of the circuit.⁵⁰ Nevertheless, twenty-four and twenty-six judge en banc proceedings ultimately proved too unwieldy, and the Fifth Circuit's judges asked Congress to split the circuit.⁵¹ Congress did so in 1981, essentially following the blueprint the Hruska Commission had suggested: putting Alabama, Florida, and Georgia into a new Eleventh Circuit, and leaving Texas, Louisiana, and Mississippi in what would become the new Fifth Circuit.⁵²

The Fifth Circuit experience provides a valuable lesson when considering proposals for the Ninth Circuit. The Ninth Circuit of the 1970s was already showing symptoms of the problems its critics complain of today: excessive reliance on visiting and district judges to fill out panels, inconsistent decisions by different panels, and a breakdown in the en banc process due to disuse, understaffing, and delay.⁵³ Yet, instead of making merely tentative attempts at internal reform, the court resisted splitting by enthusiastically reorganizing into three administrative units, implementing numerous efficiency mechanisms, and adopting a limited en banc procedure.⁵⁴ Although the

48. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1633, 1633 reads:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

49. Baker, *supra* note 2, at 59–60.

50. The Fifth Circuit rejected a limited en banc procedure partly because the law of the circuit would be held hostage to the luck of the draw. *Id.* at 62–63.

51. *Id.* at 64.

52. Act of Oct. 14, 1980, Pub. L. No. 96-452, § 5, 94 Stat. 1994, 1994; *Hruska Report I*, *supra* note 40, at 233.

53. *Hruska Report I*, *supra* note 40, at 234–35.

54. Baker, *supra* note 2, at 78–83.

Ninth Circuit contained only thirteen judges when it embarked on this project, twenty-eight active judges are now authorized⁵⁵ and twenty-two are currently sitting.⁵⁶ As will be discussed below, the Circuit's problems of the 1970s have gotten worse, and the Circuit is now troubled by others. Therefore, it is worth looking again at how the Ninth Circuit might be split to see if any practical configurations exists. The Hruska Commission criteria will be our guide,⁵⁷ despite the fact that even the Commission's former deputy Executive Director has criticized them.⁵⁸

B. *Potential Split Configurations*

1. *Horsecollar Circuit*

From the perspective of trying to divide the Ninth Circuit in half, reformers face a practical problem. Approximately sixty percent of the court's caseload comes from California.⁵⁹ Therefore, one cannot divide the circuit into two equal parts without dividing California. Ergo, the

55. 28 U.S.C. § 44 (1994).

56. Congress had not confirmed any of President Clinton's appointments since the Honorable A. Wallace Tashima and the Honorable Sidney R. Thomas on January 4, 1996 until early 1998. Active manpower on the court had dropped to eighteen judges. The Honorable Barry G. Silverman was commissioned on February 6, 1998, the Honorable Susan P. Graber on April 1, 1998, the Honorable M. Margaret McKeown on April 8, 1998, and the Honorable Kim Wardlaw on July 31, 1998. The Ninth Circuit remains below statutorily authorized full strength, and Ninth Circuit judges write openly of needing as many as 38 judges. By contrast, the new Fifth Circuit has its full complement of 17 authorized active judges.

57. See, e.g., Baker, *supra* note 2, at 77-78.

58. Hellman, *Dividing the Ninth Circuit*, *supra* note 31, at 262. Professor Hellman argues:

[L]ittle weight should be given to the 1973 report of the Commission on Revision of the Federal Court Appellate System [Hruska Commission], which recommended that the Ninth Circuit be divided into two new circuits. That recommendation has been outdistanced by events, and it cannot persuasively be invoked in support of the current legislation.

Id. Professor Hellman's disclaimer is not persuasive. He refers in particular to the Commission's recommendation that each circuit include no more than nine judges, which is obviously now unrealistic (and therefore, deserves no more discussion), and its recommendation to ban one-state circuits, which is not relevant in the Icebox Circuit debate. *Id.* at 265. Professor Hellman points out that more recent studies disapprove of circuit splitting, but their reasons are consistent with the Hruska Commission's general criteria. *Id.* He cites specifically more recent reports' concerns with disrupting precedent and administration, which the Hruska criteria mention, as well as the need for solid evidence of judicial dysfunction to justify circuit splitting, which is just a different way of saying the benefits of a split must outweigh the considerable costs. *Id.* at 267-68. No one is arguing with that. Perhaps Professor Hellman doth protest too much.

59. Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 Mont. L. Rev. 313, 318 (1996).

proposal divides the circuit by doing the next best thing: isolating California and creating a Twelfth Circuit of “everything else,” which surrounds California like a horsecollar.⁶⁰

This proposal is not aesthetically pleasing. Aside from a host of not-well-understood federalism concerns that arise from a one-state circuit,⁶¹ the resulting Twelfth Circuit does not make any sense. Why should Alaska and Arizona, Nevada and Washington be in the same judicial circuit? To make up for what can only be those “marriages of convenience,” the horsecollar configuration does not even have the merit of dividing the circuit in half.⁶² A horsecollar split would probably do what the Fifth Circuit split did: produce two circuits burdened by size instead of just one.⁶³

2. *Stringbean Circuit*

In 1995, the Senate considered a configuration that became known as the Stringbean Circuit, in deference to its long, skinny shape.⁶⁴ The configuration included everything but California, Hawaii, and the territories in the Ninth Circuit, Northern Marianas, and Guam in a new Twelfth Circuit.⁶⁵ Given that Hawaii does not even have an active judge at the moment, and would probably only be entitled to one, the stringbean Circuit would virtually create a one-state circuit. It has all the problems of the horsecollar configuration as well as another one: poor Hawaii, Guam, and the Northern Marianas and their 300 filings in 1996 would be overwhelmed by California’s 4,840.⁶⁶

60. *Id.*

61. Other concerns include a lack of diversity among the judges and the danger that senior senators from the state where a judgeship is being filled, who have considerable influence over the President’s court appointments, could essentially pack a court. *See Hruska Report I, supra* note 40, at 237.

62. This is one of the reasons that made the Hruska Commission reject such a split, in addition to the fact that it would create a one-state circuit. *Id.*

63. Baker, *supra* note 2, at 70–71.

64. *See O’Scannlain, supra* note 59, at 317.

65. Burns, *supra* note 40, at 249.

66. *See Hug, supra* note 30, at 308.

3. *1997 Senate Plan*

The split proposal that the Senate passed in a 1997 appropriations rider has similar problems. It would have left California, Nevada and the islands alone in the new Ninth Circuit, leaving Nevada, instead of Hawaii, at California's mercy.⁶⁷ By the Hruska Commission's standards, the 1997 Senate proposal is even worse than the stringbean proposal, because it would have kept a noncontiguous state, Arizona, in the Twelfth Circuit.⁶⁸ If the circuit is to be split, there must be a better way.

4. *Hruska Split*

Another recent effort to divide the circuit, a 1993 bill introduced by Oregon Representative Michael Kopetski, pilfered the substance of its proposal from the first Hruska Report.⁶⁹ That bold blueprint proposed splitting not just the Ninth Circuit, but California as well.⁷⁰ The southern and central districts would go with Nevada and Arizona and the northern and eastern districts would go with the northwest states and the islands.⁷¹ This approach would do what the stringbean and horseshoe configurations could not—effectively divide the circuit in half.⁷²

The Hruska Commission studied the unique situation of splitting one state between two circuits, and concluded that it could be managed.⁷³ The division of California might be less cumbersome than it seems. Different panels of Ninth Circuit judges decide similar state law cases all the time, with potentially differing results, and no en banc or Supreme Court

67. At least in the short term, Nevada has two active judges, including the Chief Judge, Procter Hug, Jr.

68. The problem is that no state wants to stay with California unless it has a lot of company. Arizona is no different. Arizona probably ended up in the proposed Twelfth Circuit because it was the only way the split backers could get Arizona's senators to go along, and they must have needed that support. See Tobias, *supra* note 5. It is unlikely that northwestern Republicans viewed southern Arizona, with its two active judges appointed by Democratic presidents (including the one who would be Chief Judge, Mary Schroeder) as an ideal addition to their new circuit. From this perspective, it is not surprising that Congress ultimately decided not to split the circuit this way; it is clearly not the best approach from either a northwestern political perspective or a nonpartisan practical perspective.

69. Burns, *supra* note 40, at 247–48.

70. *Hruska Report I*, *supra* note 40, at 235–36.

71. *Id.*

72. O'Scannlain, *supra* note 59, at 321. It was also nearly a 50-50 split in 1974. *Hruska Report I*, *supra* note 40, at 236.

73. *Hruska Report I*, *supra* note 40, at 238–40.

review of diversity decisions exists as a practical matter.⁷⁴ The more sobering thought is how splitting California would influence litigation strategies.⁷⁵ The Hruska Commission took a “where there’s a will, there’s a way,” approach to these questions, but the fact that the Commission repeatedly suggested new civil rules to solve these problems suggests the need for more study before Congress adopts a similar proposal.⁷⁶

The Hruska split has one merit the horsecollar and stringbean configurations lack. It collects two groups of jurisdictions with roughly similar regional interests: the Pacific Northwest plus northern California, which seem to “go together,” and the southwest plus southern California, which also go together. At minimum, the two circuits so constituted would confuse preschool viewers of *Sesame Street*’s “One of These Things Is Not Like the Other,” when they could not find the state in each group that did not fit.

The Hruska split has the same disadvantage as the horsecollar split, however. Instead of solving the problem of one large circuit, it creates two new ones with no future solution in sight. The Fifth Circuit split created two large circuits with only three states; each circuit defies additional splitting to address what is now a serious size problem.⁷⁷ Like the new Fifth and Eleventh Circuits, it is difficult to see how the new Ninth and Twelfth Circuits could be split a generation from now if one became unmanageably large again. The Hruska split would probably be the end of the line for circuit splitting in the west; there would be no obvious future stopgap solution available. Nevertheless, the Hruska configuration has sufficient merit that it should not be quickly dismissed.

74. Diversity cases never go en banc on state law issues; the job of a federal court in a diversity case is not to make law but to apply what state law it can find. *See Erie v. Tompkins*, 304 U.S. 64 (1938). The Supreme Court will also not give litigants a third bite at the judicial apple in diversity cases. *Bishop v. Woods*, 426 U.S. 341 (1976).

75. *See* Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188 (1974).

76. *Hruska Report I*, *supra* note 40, at 239.

77. The new Fifth Circuit’s filings caught up to the number that had constituted crisis proportions prior to the split in only five years. The situation has reached emergency proportions in both circuits. The Eleventh Circuit has petitioned Congress to refrain from adding more circuit judgeships in order to preserve collegiality. *Baker*, *supra* note 2, at 70–71.

5. *Icebox Circuit*

Some commentators faced with the discussion above have concluded that the Ninth Circuit defies splitting.⁷⁸ California's size does seem to get in the way. There is simply no way to divide the Ninth Circuit the same way Congress divided the Fifth—roughly in half—and avoid either splitting a state or creating a one-state circuit. In fact, the Ninth Circuit is so large, even splitting a state does not really solve its “largeness” problem; it just creates two future problems of the same type.

Suppose the goal is not to divide the Ninth Circuit in half, however. Suppose the goal is to create from the morass of the Ninth Circuit at least one sensible Twelfth Circuit of more than two contiguous states, with growing room, bound together by common regional interests and similar outlooks, but not too homogeneous. In other words, suppose the goal is not to solve the entire “problem,” but to minimize it, to isolate it, to maximize the number of citizens for whom it will be a solution, without worrying if it is not a solution for all, or even most, people in the circuit. Suppose the goal is to design a circuit as if one was designing it from scratch.

If that is the goal, the solution is simple. It is the “Icebox Circuit:” Alaska, Idaho, Montana, Oregon, and Washington,⁷⁹ a contiguous bloc slightly less than one-fourth the size of the current Ninth Circuit based on filings and population.⁸⁰ The rest of the old Ninth Circuit, including Arizona, Hawaii, Nevada, and the territories, would not be so dominated by California as to be a virtual single-state circuit.⁸¹ Arguably that area is also a regional bloc, which the Commission on Structural Alternatives

78. Actually, some are more artful. Professor Carl Tobias has written that “[m]y effort to identify a practicable realignment indicates that the court resists workable *bifurcation*.” Tobias, *supra* note 41, at 601 (emphasis added). Bifurcation is not the same as splitting a circuit, because bifurcation implies dividing the circuit into two fairly equal parts. I agree with Professor Tobias that bifurcating the Ninth Circuit probably creates more problems than it solves in our present mindsets concerning circuit structure and size. There is no reason, however, that we must divide the Ninth Circuit in half, or only into two parts. One of the merits of the icebox split is that it creates at least one sensible circuit while leaving a second circuit large enough to be sensibly split again at the appropriate time in the future. Professor Tobias makes circuit splitting sound much harder than it really is.

79. Some believe Hawaii should be part of this circuit as well. That might actually be a good idea; any circuit with Alaska and or Hawaii is going to be a large one geographically, so there is an argument for keeping that problem isolated to one circuit.

80. O'Scannlain, *supra* note 59, at 321. Arguably Montana is slightly outside that bloc, but nothing in life is ever perfect.

81. These states would make up slightly more than one-fifth of the circuit's total workload. See O'Scannlain, *supra* note 59, at 321.

implicitly recognized when it sequestered the icebox states into its proposed “Northern Division” of the Ninth Circuit.⁸²

The remaining Ninth would still dwarf all the other circuits; thus, the proposal is only a partial solution to the size problem. Instead of creating two large circuits, the icebox split would create one slightly small circuit,⁸³ and one that remains quite large. The “new Ninth” would have a workload per remaining judge so large that it probably could not function without at least a few new judges.⁸⁴ This does not necessarily mean that the “new Ninth” would quickly begin to take on the problems of the old Ninth, however. A new Ninth Circuit appropriately staffed with approximately eighteen judges in three or four states would more closely resemble the current Fifth Circuit with its seventeen active judges in three states, than the old Ninth with twenty-eight authorized judges, sixteen seniors, and eleven states plus two territories. The icebox split would be a meaningful split even if the new Ninth remained the country’s largest circuit.

Further, the icebox split would not close the door on another future stopgap solution. If the Hruska proposal removed the taboo from splitting a state between two circuits, “the rest of the problem” might be solved quite quickly if the requisite political support developed for even more splitting, either in combination with a more general circuit realignment or not. The Commission on Structural Alternatives essentially endorsed this approach within the confines of the administration of the current circuit, and its recommendations may

82. *Tentative Draft Report*, *supra* note 9, at 39.

83. If the Icebox Circuit received no more judges, it would have eight actives, including the two recent Clinton appointees. That would be two more than the First Circuit, the only circuit with a single-digit complement of judges. The Hruska Commission specifically rejected this configuration in its first report, but circumstances have changed. *Hruska Report I*, *supra* note 40, at 242. The icebox states included only 17% of the total Ninth Circuit filings in 1974. *Id.* The proportion is approximately 23% now, which is a significant change. *Id.*; O’Scannlain, *supra* note 59, at 321. The Hruska Commission specifically noted that if the filings from the icebox states significantly increased, a separate circuit would be appropriate. *Hruska Report I*, *supra* note 40, at 242. Moreover, if the icebox configuration were modified to include Hawaii, the court would arguably be entitled to nine active judges, making it significantly larger than the First Circuit.

84. O’Scannlain, *supra* note 59, at 321; *see also* Carlsen, *supra* note 26 (indicating that half of circuit’s judges are located in California.) Since Carlsen’s article appeared, Congress has confirmed four new Ninth Circuit judges, three of whom are not located in California. The four are evenly split between the icebox states and the rest of the circuit. These new additions mean fewer than half are located in California. The new Ninth would have 14 active judges, but this number is probably insufficient to manage the caseload that remains as the number of filings per judge is larger in what would be the new Ninth than in the new Twelfth.

remove the stigma from splitting California.⁸⁵ The “new Ninth” resulting from the icebox split could be further split, either at the time of the initial split or later. For example, the central and southern districts of California (constituting thirty-four percent of the current Ninth’s filings) could be placed into one circuit, and Guam, Hawaii, the Northern Marianas, the northern district of California, the eastern district of California, Nevada, and Arizona (constituting forty-three percent of the current Ninth’s filings) could be placed into another.⁸⁶

Obviously, this second split is more complicated, raising the state division problem suggested by the Hruska split and the single-state and federalism problems of the stringbean and horsecollar splits,⁸⁷ but one does not need to back this second split to back the icebox split. Putting another state, such as Nevada, with the two lone California districts might help, but that would create two circuits with fewer than three states, another stumbling block, according to the first Hruska Report.

Perhaps the solution to the size problem of the new Ninth Circuit would lie in the current Tenth, by moving one of its states into one of the two circuits created by the second split or vice-versa.⁸⁸ The Commission discussed the merits of possibly moving Arizona into the Tenth Circuit; it did not recommend such action because Arizona follows California law in a number of areas and has many economic and geographical ties to its western neighbor.⁸⁹ This bit-by-bit approach to realignment would not be quite as disruptive as completely redrawing circuit boundaries. Because the icebox states also produce fewer filings per judge than what would be the new Ninth Circuit,⁹⁰ a few more judges for the new Ninth would have to be thrown into the mix to keep the southern judges from

85. *Tentative Draft Report*, *supra* note 9, at 39.

86. *See* O’Scannlain, *supra* note 59, at 320. I should note that Judge O’Scannlain has not endorsed this approach. Aside from whatever his opinion of the proposal’s merits may be, it is probably indelicate for him to endorse any plan that would facilitate creation of the Icebox Twelfth Circuit, as he would be the Chief Judge of such a circuit if it is created soon because he is the most senior active judge under age 65 who has not previously served as a chief judge. *See* 28 U.S.C. § 45 (1994).

87. *See supra* Parts II.B.1–2.

88. Compared to the other regional circuits, the Tenth Circuit is overstaffed with judges. *See* Administrative Office of the U.S. Courts, *Judicial Business* 108–11 (1997) (listing number of filings in each circuit for 12 month period ending Sept. 30, 1997).

89. *Tentative Draft Report*, *supra* note 9, at 39, 48–49.

90. *See supra* note 84.

being deluged with work, as discussed above.⁹¹ Obviously no such “second split” should be attempted without further study. In fact, creating a Twelfth Circuit out of the icebox states, but then instituting the division format the Commission on Structural Alternatives recommends for the new Ninth Circuit would be an attractive reform. Although the Icebox Circuit alone is not a complete solution to the current Ninth’s size problem, the “new Ninth” would have a structure amenable to future tinkering, and with a few more judges, could manage quite well without the northwest. At least, we might be halfway home!

III. THE NINTH CIRCUIT’S REAL PROBLEMS JUSTIFY THE ICEBOX SPLIT

The icebox split is a partial solution to the Ninth Circuit’s size problem that would leave an open door to a complete solution that would not completely disrupt circuit boundaries. This assumes, however, that the Ninth Circuit’s size is, in fact, a problem. Academicians and others interested in court administration have been fascinated over the past twenty years since Congress opened the door to judicial innovation⁹² at how creative the Ninth Circuit has been in adapting to the challenges of its extensive land area, large collection of judges, and daunting caseload.⁹³ My first-hand observations of the Ninth Circuit reveal that the Circuit does have some size-related problems that splitting the circuit could mitigate. These problems include a busyness due to certain categories of work, inconsistent and unpredictable circuit law, a strain on collegiality, and geographical polarization.

A. *The Icebox Split Would Decrease Workload*

1. *Big and Busy*

One does not have to know much about the Ninth Circuit to realize one thing: the Ninth Circuit is big. The Ninth Circuit contains more states, covers more territory, boasts more judges, and dispenses justice to

91. It would no doubt be another sore point with northwesterners if they knew that their judges are overworked so that they can help process California’s appellate filings.

92. Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1633, 1633.

93. Their evaluations, that the Ninth Circuit is managing its magnitude well, are well documented elsewhere. *See, e.g.*, Meador, *supra* note 39, at 200–01. Most of the essays in this book are positive, although some raise questions about whether the Ninth Circuit should remain as one unit.

more people than any other circuit.⁹⁴ If just one of its nine states were a separate circuit, that state would be the third largest circuit in the nation.⁹⁵ The Ninth Circuit's population of forty-four million people is at least twice as large as all but one other circuit.⁹⁶ That's big.

The Ninth Circuit is also busy. Its 8,692 filings for the twelve month period ending in September 1997 were over 1,000 more than in the next largest circuit, the Fifth, but during much of that year the Ninth Circuit had only one more active judge.⁹⁷ The Ninth has become a model of what can be done—through screening, delegation to staff, limited en banc proceedings, memorandum dispositions, and submission on the briefs—to maximize the efficient use of judicial resources.⁹⁸ Academic commentators find the Ninth Circuit's machinations to avoid drowning in this workload fascinating.⁹⁹ That's busy.

So the Ninth Circuit is big and busy. Is that bad?

It probably is. The Ninth Circuit may have led the way in implementing efficiency mechanisms to help it manage its docket, but the circuit's workload still makes it difficult for judges to lavish the attention they might wish on their work.¹⁰⁰ The primary cause is simply that for some time the Ninth Circuit had been trying to do significantly more work than the Fifth Circuit with virtually the same number of active judges, and a few more Ninth Circuit confirmations have not solved the problem.

Commentators on both sides of the split debate may have missed the significance of the workload issue. Proponents of the circuit split often cite the court's comparatively large size and high workload as an argument in the split's favor.¹⁰¹ Critics point out the limits of that argument: spreading the same number of filings over the same number of

94. See Baker, *supra* note 2, at 86–88.

95. Diarmuid O'Scannlain, *A Ninth Circuit Split Is Inevitable, but Not Imminent*, 56 Ohio St. L.J. 947, 949 (1995).

96. See Baker, *supra* note 2, at 87.

97. See *Judicial Business*, *supra* note 88. Further, the Fifth Circuit had many more prisoner petitions than the Ninth, which tend to require less work than ordinary civil cases. *Id.* at 109–10.

98. In fact, one argument against splitting the circuit is that students of judicial administration will lose their laboratory of judicial efficiency studies. See, e.g., Tobias, *supra* note 41, at 594–95. They need not fear—the Fifth Circuit and the new Ninth would soon fill the void.

99. See Meador, *supra* note 39.

100. See, e.g., Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52.

101. See Burns, *supra* note 40, at 250–51; O'Scannlain, *supra* note 59, at 315.

judges divided into two circuits still means the same number of judges have to process the same number of cases.¹⁰² What is amazing, however, is the number of well-informed court watchers who seem convinced that splitting the circuit will have virtually no effect on workload.¹⁰³ These observers do not completely appreciate the different types of work the court does.

The work judges and their staffs do can be divided into two categories: work in which volume depends on the number of filings per judge and work in which volume depends on the total number of filings, or put differently, the size of the circuit. Most of the workload dependent on filings per judge arises directly or indirectly from garden-variety filings, that is, appeals the judge will hear in a group of three judges sitting either as a screening panel or a normal calendar panel. As long as filings per judge remain the same, the size of the circuit in which they are heard will not appreciably change the per judge workload they create.¹⁰⁴ Work whose volume depends on the size of the circuit arises from court administration and efforts to maintain the consistency of the circuit's law. The distinction between the two groups is subtle. Therefore, it is worth considering exactly which tasks fall into each category.

2. *Inside the "Sausage Factory"*¹⁰⁵

Since going into private practice, I have learned from those who have not spent time working for appellate courts that most lawyers have almost no idea of what sorts of tasks appellate court judges actually do. To remedy this information gap, imagine a Ninth Circuit judge's office. He or she has three or four clerks, mostly recent law school graduates, and either one or two secretaries. Judges generally sit on seven week-long regular panels a year and two screening panels. Screening panels resolve truly routine cases and motions, usually about 140 per week.¹⁰⁶ On regular panels, judges hear thirty to thirty-five cases of varying complexity. Each judge's staff prepares bench memoranda on one-third

102. See Baker, *supra* note 2, at 90; Tobias, *supra* note 41, at 592.

103. See, e.g., Baker, *supra* note 2, at 89–90; Tobias, *supra* note 41, at 591–92.

104. This statement assumes that per capita filings per state do not vary significantly and do not take certain other size related problems such as administration and collegiality into account.

105. J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147, 1170 (1994).

106. A judge on a screening panel may send a case to a regular panel on the theory that it cannot be resolved in a matter of minutes.

of the cases and distributes them to other judges on the panel. Judges will read the cases and prepare for oral argument or for submission on the briefs. They will occasionally exchange additional memoranda on the cases prior to argument, and in a number of cases there are procedural motions requiring orders or other attention from either judges or staff. Many cases will be argued orally, then submitted for decision. After submission, each judge will prepare either a published opinion or an unpublished memorandum disposition in about a third of the cases, usually the cases for which his office prepared the preliminary bench memorandum. Most judges will dissent or concur separately in a handful of cases. In between these legal activities, administrative and legal staff will assign cases among clerks in the office, keep track of all the internal memoranda and research, type dictation, do necessary research and support tasks to help the judge prepare for cases for which his chambers did not draft the bench memorandum, prepare the judge's calendar materials so that they will be readily available on the bench, make sure those materials are properly mailed and returned to the judge's home chambers, make extensive travel arrangements, ensure that the judge's visiting chambers is properly prepared for his use, and do innumerable other tasks. These and other similar tasks are probably a full time job by themselves.¹⁰⁷

Assuming the number of judges in the current Ninth Circuit states remains constant, most of the regular calendar and screening panel work would remain no matter whether Congress splits the circuit or not. Assuming also that the number of filings per capita is equal from state to state (which is not quite the case), Congress could split the circuit and divide the judges between circuits in proportion to population, and workload per judge from these activities would not change. The work load from other activities, however, could be reduced or eliminated.

3. *Drowning in En Bancs*

The amount of work associated with many judges' tasks depends on the size of the circuit. Take en banc calls, for example. A case is considered "en banc worthy" if it creates an inter- or intra-circuit split or is a matter of particular importance,¹⁰⁸ but judges call for en banc

107. My observation is that it takes two to three full workdays for a trained clerk to produce the average bench memorandum. If each chambers writes 10 bench memoranda, it will take 20 to 30 days of clerk time, and when I say "full" workdays, I am not referring to a mere eight-hour day.

108. See Fed. R. App. P. 35; 9th Cir. R. 35-1.

rehearing and ultimately decide to hear cases en banc for many reasons, including the simple fact that they disagree with the panel's decision.¹⁰⁹ A bigger circuit is likely to produce more en banc calls than a small circuit simply because it decides more cases.¹¹⁰ Because each judge is likely to make a few en banc calls a year regardless of the "worthiness" of en banc according to the rules, the more judges, the more en banc calls. Either way, a large circuit with many judges means many en bancs.

En banc calls add work for every judge in the circuit. In the current Ninth Circuit, if a judge calls for en banc in a California case, all the active judges from Washington also work up the case in order to decide how to vote and in preparation for possible en banc panel service. The opposite would be true if California and Washington were in different circuits, which would mean less work for circuit judges in both states. If Washington and California were in two different circuits and the number of filings per judge remained the same, judges in the two states might have the same panel workload per judge, but their caseloads would include only a fraction of the en banc cases they currently manage. Therefore, if it were possible to split the Ninth Circuit so that half the filings went to one of the circuits and half the filings went to the other circuit, one would expect the panel workload of each judge to remain the same, but the en banc workload of each judge to decline by about fifty percent. That would be a measurable change in workload. The question is: How much of a change?

The decrease in workload that would result from fewer en banc cases is greater than most observers realize. Professor Arthur Hellman, a split critic and student of Ninth Circuit administration who questions the usefulness of the en banc process in the Ninth Circuit, has done research showing that only about one percent of the Ninth Circuit's published opinions are reviewed in en banc rehearings.¹¹¹ It would be incorrect to infer from that, however, that en banc calls do not constitute a significant amount of the average judge's workload. Much more than one percent of a judge's time is devoted merely to deciding whether to call for en banc rehearing and whether the court should, in fact, rehear the case en banc.

109. Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in *Restructuring Justice*, *supra* note 39, at 55, 74–75.

110. Adding more judges would not change this. In fact, adding more judges might increase the number of en banc calls per judge due to the consistency problems discussed *infra* Part III.B.1. Also, the greater number of judges making the occasional en banc call simply because the judge involved disagrees vehemently with the outcome.

111. Hellman, *supra* note 109, at 74.

By their very nature en bancs are some of the most difficult cases, requiring more research, more “tough calls,” and therefore, more precious judge time. My own informal observations lead me to think that each judge and staff member devotes approximately ten hours a week to en banc work.¹¹² This work includes deciding whether to call en banc, drafting memoranda for and against going en banc, discussing en banc cases in chambers, managing the mountain of e-mail en banc calls produce, voting and maintaining voting records, reading and preparing internal memoranda for the judge to use if chosen for the en banc panel, traveling and hearing oral argument, recovering from that travel and reorienting back to office work, preparing opinions after submission, making suggestions and voting on opinions (over and over sometimes!), and performing all the research and administrative work necessary to support those activities. That is a significant investment in the en banc process.

Maybe the problem is not the size of the circuit, say some critics. Perhaps the whole en banc process is simply more trouble than it is worth.¹¹³ I doubt it. Only one or two percent of all opinions may provoke an en banc call, but the specter of en banc haunts every panel.¹¹⁴ Many

112. Everyone connected or formerly connected with the Ninth Circuit who hears this number initially questions it. I find universal agreement that the investment in the en banc process is large, but I hear two criticisms: (1) 10 hours is more time than clerks spend; and (2) clerks spend 10 hours a week, but judges do not. Perhaps neither clerks nor judges realize how much time they spend on en banc related matters. My view may be colored by the fact that I worked for a more junior judge, and junior judges are more frequently assigned en banc opinions and therefore structurally have more work to do on en banc projects. An important thing to remember is that *every judge is different*. It is obvious that some judges, and therefore their staffs, participate more actively in the en banc process—calling for en banc and circulating memos—than others. Occasionally a judge will become deeply involved with an en banc project that consumes an immense amount of time, even though that judge would not ordinarily put so much time into en banc work. Sitting on an en banc panel probably consumes at least one day traveling and hearing argument, and another day preparing for the argument. Upon hearing this, many who questioned 10 hours for judges find themselves agreeing with it. Ten hours is an average for the court. Obviously, experiences will differ.

Adding judges can relieve some of the burden of sitting on en banc panels. My suspicion, however, is that such relief is offset by additional judges who increase the number of en banc calls. Technically there are rules about what cases are en banc worthy (matters of particular importance, inter- and intra-circuit conflicts), but a significant number of en banc calls come from judges who simply think the panel opinion is dead wrong. The larger the court’s caseload, and/or the more judges on the court, the more en banc calls there will be. More en banc calls increase workload to some degree, regardless of the number of judges on the court available to sit on en banc panels.

113. See, e.g., Hellman, *supra* note 109, at 74.

114. See *id.* at 74, 77–78 (discussing this alternate view that is more consistent with my observations).

judges consider “stop clocks,”¹¹⁵ a means by which an off-panel judge can pressure for changes in an opinion without invoking the formal en banc process, and en banc calls themselves, quite embarrassing when their work is the target. Judges self-edit and within panels they edit each other to avoid “unnecessary” en banc calls. Opinions that “go too far,” are frequently tempered long before they see print by intrapanel work or discussion with off-panel judges. Defending against an en banc call is enough work to provide a strong incentive for judges to remove provocative dicta and other en banc “flags.” In sum, the en banc process is something of an interpersonal stick to keep otherwise quite unconstrained judges in line.¹¹⁶ Therefore, the importance of the en banc process in maintaining consistent law, and also in getting to the correct result and producing the most useful precedent, goes far beyond the number of times it is specifically invoked.

Of course, the simple fact that the Ninth Circuit hears so many cases means that it hears proportionally more hard cases that will interest the entire court.¹¹⁷ That means that the absolute number of complex, en-banc-worthy cases each judge must consider is greater, increasing proportionally the amount of this type of work Ninth Circuit judges do compared to judges in smaller circuits. Ninth Circuit Judge Jerome Farris has further argued that the number of tough cases the Ninth Circuit decides each year explains the court’s high reversal rate.¹¹⁸ That

115. “Stopping the clock” is a way that an off-panel judge asks the panel to give him or her more time to consider calling for en banc rehearing. *See id.* at 71. Usually a memorandum requesting a stop clock is accompanied by suggestions for changing the opinion—perhaps even its outcome. *Id.* at 71–72. Making such changes will eliminate the need off-panel judge sees for en banc rehearing. *Id.*

116. After all, if a judge has already decided to buck stare decisis or throw in some questionable dicta, that judge has clearly not been constrained by the normal jurisprudential means. There are so many ways to distinguish precedent without running afoul of stare decisis. Professor Hellman suggests that it is “ludicrous” to think that the specter of en banc could cause a life-tenured judge to decide a case in a different way from the one his own reading of the law demands. *Id.* at 77. This is not consistent with my observation of judges at work. A judge is not deaf to reason; she may conclude her reading of the law is wrong or would benefit from fuller development. Appellate judges may not be overly concerned about job security, but they do value the high opinion of their peers. Some judges, such as Judge Stephen Reinhardt, feel they can best maintain their integrity and the respect of others they value by taking on higher authorities. David M. O’Brien, *Reinhardt and the Supreme Court: This Time, It’s Personal*, L.A. Times, Dec. 15, 1996, at M2. Judge Reinhardt’s approach, however, is not representative of Ninth Circuit judges on this point, in my view.

117. *See* Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 Ohio St. L.J. 1465, 1470–71 (1997).

118. *Id.*

explanation seems improbable,¹¹⁹ but the large number of tough cases might explain why Ninth Circuit judges feel overworked. Judges in two smaller circuits would not face so many such cases.¹²⁰

A related task whose length depends on the size of the circuit is reviewing slip opinions and attorney-filed suggestions for rehearing en banc.¹²¹ The court issues slip opinions prior to publication in the Federal Reporters that arrive every day in judges' chambers. Both judges and clerks review slip opinions and the briefs many losing litigants file requesting en banc rehearing of a panel decision. Reviewing slip opinions and requests for en banc rehearing has three purposes: helping judges and clerks keep up with the law of the circuit, screening opinions in order to make extra-panel suggestions for changes, and identifying possible en banc calls. These contribute to the consistency and quality of the circuit's law. Dividing the same number of slip opinions and requests into two circuits will decrease the individual workload for all, because

119. For example, the Ninth Circuit was equally large in the late 1980s and early '90s, but the reversal rate declined considerably then. See Carlsen, *supra* note 26.

120. One fair criticism of this discussion is that on a smaller court, judges would have to sit on a greater percentage of en banc panels. That would increase workload. I suspect, however, that sitting on a greater percentage of en banc panels is a minor offset to the considerable gains to be had from decreasing the size of the circuit and therefore cutting the number of en bancs to be heard for two reasons. First, very few cases are actually heard en banc, but many suggestions for rehearing en banc are made by the parties, many stop-clocks are requested, and many en banc calls are made and debated. Those burdens are substantially greater on a large circuit. Second, I suspect it is true that a certain number of en banc calls are made by each judge; adding judges increases en banc calls, even if the number of en banc worthy cases does not increase.

121. Ninth Circuit judges can, and do, limit the amount of "new law" in the circuit by writing as many unpublished memorandum dispositions as possible. This is just another example of trying to keep the lid on the workload problem, however. Some dispositions simply must be published, and it would be a dereliction of judicial duty to do otherwise. The Ninth Circuit's rules require publication only if it:

- (a) Establishes, alters, modifies or clarifies a rule of law, or
- (b) Calls attention to a rule of law which appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
- (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

9th Cir. R. 36-2.

each judge will only have to read a fraction of the opinions he read before.¹²² Greater familiarity with the most up-to-date twists and turns in circuit law might also eliminate some en banc calls and facilitate the research process on routine cases.¹²³

Anyway, suppose reviewing suggestions for en banc rehearing and slip opinions takes judges and clerks three to five hours a week each.¹²⁴ Add to that *at least* five more hours preparing death penalty cases¹²⁵ and you will see that as many as twenty hours a week are spent on tasks made more time-consuming because the Ninth is a large circuit. If the Ninth Circuit were divided in half, that twenty hours might become ten.

Ten hours makes a huge difference when a chambers is already choked by its large caseload. Imagine adding a very full day to an already overloaded week. Ten hours, week in and week out, is enough to encourage even the best of judges to implement dubious efficiency mechanisms such as relying uncritically on bench memoranda, allowing

122. See generally Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 72 (discussing judicial workload in larger circuits).

123. See O'Scannlain, *supra* note 95, at 948. This benefit is more meaningful to judges than clerks, because most clerks do not stay around long enough to benefit from institutional knowledge and awareness. On the other hand, if a judge organizes his office so that he reviews cases and gives instructions to clerks based on his own intuitive feel for the case, a solid sense of the broad outline of circuit law can save everyone a great deal of time and effort. *But see* Meador, *supra* note 39, at 197 (stating that Ninth Circuit may prove wrong rule of thumb that appellate court is too large if its judges cannot read all of circuit's opinions).

124. This is not nearly enough time to read all the opinions, but it does permit an intense "flip-through." According to Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, it can easily take an hour each day for judges on his much smaller court to read slip opinions. Wilkinson, *supra* note 105, at 1177. A former Ninth Circuit Judge, Justice Anthony Kennedy said that as early as 1978 he could no longer find the time to read all the Ninth Circuit's published dispositions. *Letter from Justice Anthony Kennedy*, *supra* note 34, at 2.

125. It is clear that some judges lavish care on all death penalty cases (probably on the assumption that, if no one else does so, that judge will make an en banc call as a matter of course), increasing the workload their chambers face as a result; therefore, an estimate of an average is difficult to make. This is not to say that some judges do not care about death penalties. All judges take them seriously, but many only work up the cases where they are assigned either to the three-judge or en banc panel. Because many en banc proceedings in collateral (habeas corpus) death penalty cases occur under immense time pressure right before an execution, this is the one situation in which judges learn who will sit on the en banc panel in advance of the en banc call. 9th Cir. R. 22-3(b). As a result, the judges may be able to spend weeks or even months poring over briefs and the record prior to voting. Often the one copy of the record is passed from judge to judge as the execution date approaches. Even these efforts do not completely succeed in making the death penalty process run smoothly. See Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 Yale L.J. 205, 216-18 (1992-93); Alex Kozinski, *Tinkering with Death*, New Yorker, Feb. 10, 1997, at 48, 48. Many death penalty cases provoke court-wide discussion and debate long before decisions come down or certain relevant filings are made.

clerks not only to draft decisions but to draft decisions that are merely warmed-over bench memoranda,¹²⁶ declining to participate actively in the en banc process, and submitting too many cases on the briefs. Ten hours can be the difference between trying to do good work and trying to survive. If we structure our appellate courts so that that judges' and staffs' mere survival constitutes heroism, then we do not deserve justice.

It does not matter much whether I have over or underestimated a little in concluding that every Ninth Circuit judge and clerk could save ten hours a week if the circuit were split in half. If I have underestimated, the problem is even more alarming; if I have overestimated, the point remains that the split will decrease workload enough to be worth considering. It does not matter if one of the two new circuits ends up with more filings per judge than the other; a couple of additional judges on the busier circuit can solve that problem, and should then be part of any split package. Further, since the Icebox Circuit would be particularly small, time savings of the type described above would be a bonanza for its judges because they could be expected to save more than half of the time currently spent on these types of tasks. It is simply not true that a circuit split would make no difference to the circuit's "real" problem: workload.

126. More frequently than is comfortable, one finds Ninth Circuit *opinions* (as opposed to unpublished memorandum dispositions) that are obviously warmed-over bench memoranda. Not all judges do this—some write all their own opinions—but that decision involves a tradeoff. The workload is sufficiently large that corners must be cut somewhere, and judges who write all their own work may have a hard time keeping their dockets current.

Opinions that law clerks write have several disadvantages. Aside from the obvious fact that clerks are not appointed by the president and confirmed by the Senate, and therefore should not be writing law for the nation, what clerk-written opinions mean for precedential value and *stare decisis* in the long run I cannot imagine. As Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has explained, "The more apparent that an opinion is the work of the law clerk, the less attention judges and lawyers will pay to the broad holding. This will reduce the authority of judicial decisions as sources of legal guidance and will increase uncertainty and with it litigation." Richard A. Posner, *The Federal Courts: Challenge and Reform* 149 (1996). Per curiam decisions, written by staff attorneys and signed by the judges, are not taken as seriously as opinions obviously authored by a particular judge. Is a clerk-written opinion equally persuasive as one that is obviously judge-written? It is certainly easy to tell the difference. *Id.* at 145–57. Clerk-written opinions necessarily lack the confidence and frequently the gravitas of judge-written work. Clerk-written work often attempts to reason backwards to a proposition by eliminating all other possible results, while judge-written work starts by directly establishing the veracity of the proposition at hand. Chief Judge Posner has also noted that opinions law clerks write have an almost ostentatious reliance on footnotes, secondary sources, and other hallmarks of legal scholarship. *Id.* at 148.

4. *An Hour Here, an Hour There*

The split could save everyone some time in other little ways. For example, the Ninth Circuit has too many judges and too many panels hearing cases in too many places and at too many times ever to hold a court meeting while the judges are all on calendar in the same city. This is very wasteful; it means all the judges have to make additional trips for court meetings several times a year. A smaller circuit, such as one made up of the northwestern states, could save that time because all the judges could sit on different panels, in the same city, at the same time, and hold the meeting there and then. Two geographically smaller circuits would also decrease judges' travel time to get to their panel calendars and en banc hearings.¹²⁷ That may not be meaningful to the army of judges from the Los Angeles area who either walk down the hall, drive across town, or grab a airline shuttle to get to their hearings, but it makes a great deal of difference to judges coming from Fairbanks, Billings, and Boise.¹²⁸ Individually, these and other changes might not make much of a difference in an average week—an hour or so—but an hour here, an hour there . . . why, all of a sudden you are talking about real time!

5. *Diminishing Marginal Returns from More Manpower*

Further, general management theory teaches that as organizations increase in size, the administrative burden increases geometrically,¹²⁹ and there is no reason to think a court should be different in this regard from any other organization. According to Peter Drucker, “[t]he larger any body, physical or social, becomes, the more of its energy will be needed

127. *Joint Statement of Stephen S. Trott & Thomas G. Nelson to the Commission on Structural Alternatives for the Federal Courts of Appeals* 7 (May 27, 1998) (visited Sept. 24, 1998) <<http://app.com.uscourts.gov/hearings/submitted/pdf/nelson.pdf>>.

128. It actually makes a big difference to Los Angeles judges as well. If a judge on calendar is sitting in a city not her own, she not only loses the travel time to get there, but she faces the inefficiencies of working out of an office that is not her own and the irritations (and time killers) of living out of a suitcase. Judges from everywhere except Los Angeles and San Francisco face this for most if not all of their calendars. The plurality of judges are from Los Angeles, however, and they would be a majority in a new Ninth Circuit. These judges might travel only rarely in a new circuit although they frequently travel to San Francisco and Seattle in the current Ninth.

129. Peter F. Drucker, *Management: Tasks, Responsibilities, Practices* 639–40 (1974); see also C.E. Ferguson, *Microeconomic Theory* 188–89 (1966). Problems of management coordination and control, which are likely to develop in large organizations, create diseconomies of scale. Paul G. Keat & Philip K.Y. Young, *Managerial Economics: Economic Tools for Today's Decision Makers* 330 (2d ed. 1996).

to keep the ‘inside,’ that is, its own mechanisms, alive and functioning.”¹³⁰ Size determines the complexity of an organization, but complexity feeds size.¹³¹ It is a vicious circle. Professors Harold Koontz and Heinz Weihrich put it in practical terms: “[t]he larger the organization, the more decisions to be made, and the more places in which they must be made, the more difficult it is to coordinate them.”¹³² This is precisely the phenomenon Justice Charles Evans Hughes described when confronted with President Franklin Roosevelt’s court-packing plan: “[t]here would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.”¹³³ Even judges on circuit courts, where only three judges decide each case, have noted similar problems of scale.¹³⁴

Staff can help, but “more staff” is not necessarily the answer.¹³⁵ Additional staff will produce diminishing marginal returns because more staff requires even more staff to administer them. Judges, however, will always have to carry a good bit of the administrative burden and the administrative burden on the Ninth Circuit judges is bigger than on judges in other Circuits because the Ninth Circuit is bigger than other circuits. The Chief Judge’s job is bigger because the circuit is bigger. The en banc coordinator’s job is bigger because the circuit is bigger—there are more en bancs and more judges to speak on each case.¹³⁶ The death penalty coordinator’s job is bigger because the circuit is bigger—there are more death penalty cases and more judges to coordinate. The judge’s conference organizer’s job is bigger, because the conference has to be done on such a grand scale. The law clerk orientation chair’s job is bigger for the same reason. Staff can help considerably, but judges quite properly do a significant amount of the work. Again, the size of the Ninth Circuit has increased workload per judge. Filings per judge are just part of the story.

The Fifth and Eleventh Circuits, formerly a combined Fifth Circuit, are examples of an interesting phenomenon worthy of careful academic

130. Drucker, *supra* note 129, at 639.

131. *Id.*

132. Harold Koontz & Heinz Weihrich, *Management* 226 (9th ed. 1988).

133. Tjoflat, *supra* note 122, at 71 (quoting Justice Charles Evans Hughes).

134. *Id.*; see also *infra* notes 136–39 and accompanying text.

135. As will be discussed later, use of staff is a double-edged sword. See *infra* Part III.C.6.

136. Although en banc courts have only eleven members, all judges participate in the process of deciding whether to take the case to en banc rehearing.

attention. Before Congress split the Fifth Circuit, it resolved 4,717 appeals per year. In 1995, the two halves of the old Fifth, the new Fifth and the new Eleventh Circuit, resolved 12,401 appeals with only three more judges than the old Fifth. Nevertheless, judges on both courts are resisting additions to their ranks, while Ninth Circuit judges are begging senators to confirm nominees.¹³⁷ Part of the reason the Fifth and Eleventh Circuits have absorbed such a huge caseload increase with essentially the same number of judges, according to the Eleventh Circuit's Chief Judge Gerald Bard Tjoflat, is that two smaller courts are more collegial than one big court, and collegiality saves time.¹³⁸ Smaller courts are more efficient than one large court because the judges know each other and get along better, greasing the wheels of productivity as they go. For the same reasons, there may be limits to the Ninth Circuit's economies of scale. In most institutions, the marginal utility of more manpower does eventually become negative.¹³⁹ Judge Tjoflat's personal experience confirms that the same thing can happen on courts. Given that the Ninth Circuit's caseload is not declining, maybe it should try some of the Fifth Circuit's medicine.

B. The Icebox Split Would Improve Consistency and Predictability in the Law

1. Consistency: Limited En Banc or Expanded Panel?

When the Fifth Circuit's workload spiraled out of control in the late 1970s due to increased population and a bloated civil rights docket, Congress first tried to solve the problem by adding more judges.¹⁴⁰ Two years later, the Fifth Circuit's twenty-six active judges begged Congress to divide the circuit.¹⁴¹ Maintaining uniformity of the circuit's law was a primary motivation: there were simply too many panels and twenty-six judge en banc courts were too unwieldy in operation to keep the law of the circuit under control.¹⁴²

137. Baker, *supra* note 2, at 70–71. In fact, the court has requested 10 additional judges, for a total of 38. O'Scannlain, *supra* note 59, at 315.

138. Tjoflat, *supra* note 122, at 70.

139. See, e.g., Keat & Young, *supra* note 129, at 330.

140. See Baker, *supra* note 2, at 62–68.

141. *Id.*

142. *Id.*

Chief Judge Gerald Bard Tjoflat, who served on both the old Fifth and the new Eleventh, described the problem to Professor Thomas Baker in terms that make it sound inevitable in large circuits:

The more judges we create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.¹⁴³

In other words, the more judges, the more panel combinations; the more panel combinations, the greater likelihood that any two panels will produce irreconcilable interpretations of the law.¹⁴⁴

The Ninth Circuit has that very problem. Survey data indicate that consistency is not viewed as a hallmark of the court's work.¹⁴⁵ The Ninth Circuit's consistency problem has two twists, however. First, with twenty-two active judges, but filings that would justify twenty-eight, the Ninth Circuit relies heavily on senior and visiting judges, bringing that many more of Judge Tjoflat's "point[s] of view" into the mix.¹⁴⁶ Second,

143. *Id.* at 66–67 (quoting from interview with Gerald Bard Tjoflat).

144. *See* Wilkinson, *supra* note 105, at 1176.

145. Meador, *supra* note 39, at 196. Surveys do come out on both sides, *see* Baker, *supra* note 2, at 92; but, they indicate a disturbing amount of dissatisfaction with the court's consistency.

146. Many Ninth Circuit senior judges are as well known to the Ninth Circuit bar as active judges, but visiting seniors and district judges are not. Those judges may only sit with the circuit once or twice a year, which means it may take between five and ten visiting judges to make up the calendar work of an active judge (a visiting judge under the rules cannot do the court's en banc or death penalty work). Therefore, the court may need as many as five or ten more "points of view" to make up for the one point of view lost due to the lack of an active judge.

By the way, frequent use of visiting and even senior judges also—you guessed it—increases workload! Visiting judges are anxious to learn and were able to catch on quickly to many of the arcane procedural rules and informal practices of our court (the way memorandum dispositions are written, the protocol of letting writing judges vote first on petitions for rehearing, etc.) that had taken me much of the year to figure out. Nevertheless, active judges' chambers spend considerable time

the Ninth Circuit does not resolve inconsistencies by bringing all the points of view together in the en banc process.¹⁴⁷ The former Fifth Circuit found during its twenty-six active judge days that en banc consideration was not much of a solution to consistency problems because of the administrative complexities of convening such a large court—where is there a room big enough?—and the difficulty of getting opinions drafted. These were the primary reasons the Fifth Circuit judges ultimately asked Congress to split the circuit after first trying to make a go of it as a twenty-six judge court.¹⁴⁸ The Ninth Circuit relies instead on a “limited en banc” court of only eleven judges.¹⁴⁹ This solution for a (too) large court is only a partial one, however. A limited en banc court is easier than a full en banc court to convene when inconsistencies in the law arise, but it adds potential instability because it does not bring together all the points of view on the court.

Happily for workload concerns, although not necessarily for outcomes,¹⁵⁰ the Ninth Circuit has so far resisted calls for full court en

educating the visiting chambers to help them get up to speed. Active judges are also hesitant to allow visiting judges to write the most controversial opinions, feeling, quite properly, that if there are to be major changes or developments in the law of the circuit, a Ninth Circuit judge should make that statement. That just means, however, that the clerks of active Ninth Circuit judges get all the hard bench memoranda and the active Ninth Circuit judges have to write all the hard opinions, with all the implications for workload that implies. There is no rule on this, of course, but it is pretty clear that this is how opinions get assigned. Many non-active judges are not supposed to participate in the en banc process. See 28 U.S.C. § 46 (1994). Thus, the active judges on the panel are left with the responsibility of defending the panel’s work later on.

147. The Ninth Circuit uses only a “limited” en banc process, which, of course, is no en banc process at all. See 9th Cir. R. 35-3.

148. See *supra* notes 48–52 and accompanying text; Baker, *supra* note 2, at 62–64.

149. 9th Cir. R. 35-3 states “The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.” Congress authorized limited en banc courts in 1978, but the Ninth Circuit is the only court to take Congress up on the offer. See Hellman, *supra* note 111, at 62–70.

150. Bear in mind that the Supreme Court granted certiorari in three Ninth Circuit en banc cases in the October 1996 term and reversed them all. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Arizonans for Official English*, 520 U.S. 43 (1997); *California v. Roy*, 519 U.S. 2 (1996). It implicitly overruled at least one more, *United States v. Keys*, 95 F.3d 874 (9th Cir. 1996), in *Johnson v. United States*, 520 U.S. 461 (1997). There are limits to how far this data can be taken. Aside from the fact that four cases are probably not statistically significant, one still might argue that this record is a serious indictment of the en banc process—especially since in at least two of those cases the panel “got it right” in the first place. See *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *United States v. Keys*, 67 F.3d 801 (9th Cir. 1995), *vacated*, 117 S. Ct. 1816 (1997). Further, these were all tough cases, on which even the most finely tuned legal minds could differ. See Farris, *supra* note 117, at 1469–70. Nevertheless, the Ninth Circuit’s reversal rate is by leaps and bounds the worst in the nation. *Id.* at 1465.

banc.¹⁵¹ As long as the Ninth Circuit remains understaffed with only twenty-two judges, an eleven-judge court is at least half of the total, although not the more attractive majority. If Congress appoints more judges,¹⁵² however, the Ninth Circuit's current procedure might degenerate from being a limited en banc to a mere expanded panel.¹⁵³ This has disconcerting implications for the legitimacy of en banc proceeding, both to litigants and judges. Professor Hellman's research indicates that the tiny group of cases actually decided by an en banc panel may not be what either practitioners or academics think are most important,¹⁵⁴ but what en banc opinions do provide is the rare opportunity for the court to speak with something of an institutional voice. The smaller the percentage of circuit judges on the en banc court, the less accurate and compelling that voice becomes, and the more difficult reading the court becomes.

2. *An "Unknown" Bench: Problems of Predictability*

Academic observers laud the Ninth Circuit's many administrative reforms, such as the limited en banc, that enable the judges to process their huge caseload and coordinate the efforts of so many.¹⁵⁵ One disadvantage is that these reforms add an air of mystery to the court; they make the result difficult to predict, because the process is hard to understand.

The Ninth Circuit does not need more mystery; it already has plenty.¹⁵⁶ Surveys and anecdotes are full of complaints that Ninth Circuit panels considering similar issues often decide them differently and that results are too hard to predict. As Karl Llewellyn explained in *The Common Law Tradition*, lawyers' ability to predict the outcome of appeals, and therefore to determine whether they should even bring them

151. The Ninth Circuit has apparently voted three times to consider full court en banc. See *Compassion in Dying v. Washington*, 85 F.3d 1440 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Campbell v. Wood*, 20 F.3d 1050 (9th Cir. 1994); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980).

152. Although the Senate apparently turned off the spigot of Ninth Circuit confirmations in 1996 and 1997, the confirmation process is moving again. See *supra* note 56.

153. Changes, such as full court or "fuller court" en banc might follow, adding to total workload.

154. See Hellman, *supra* note 111, at 76.

155. See Baker, *supra* note 2, at 78-83; Tobias, *supra* note 35, at 1363-64.

156. Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, in *Restructuring Justice*, *supra* note 39, at 206, 210.

in the first place, has much to do with how well the lawyer knows the court, its procedures, and the persons who will make the decision.¹⁵⁷ This is the court's "reckonability."¹⁵⁸ The Ninth Circuit is not very reckonable, according to Professor Paul Carrington, because it has so many judges and so many combinations of personalities and philosophies that it is very difficult to "know" the court, or worse, the three-judge interaction of personalities that will hear your case.¹⁵⁹ Uncertainty has the effect of depressing the value of a case, which effectively robs claimants of their full rights.¹⁶⁰ Professor Carrington has applied Karl Llewellyn's principle of reckonability to the Ninth Circuit and has warned that the size of the court may actually be increasing caseloads because it discourages settlement.¹⁶¹ Two smaller courts would be more reckonable to their respective bars than one large court.

3. *Problems of Consistency and Predictability: Points of View and "Outlier Panels"*

On every court, there are a few judges with extreme or "outlier" points of view. This can provide a healthy diversity to the court. There is something irritatingly endearing about Judge Z who, for example, "just does not believe in fee-shifting statutes," which adds a useful reminder that there is more than one view on even fairly well-settled matters. Odds are that on a small court only one or two of the judges have outlier views in common, which means that while outlier judges may have the ability to influence the tone of the law of the circuit, they rarely ever get much of a chance to change it. Majority rules, tempered by civility to the minority.

On a court as large as the Ninth Circuit, however, three or more judges could be lumped together near one of the ends of the bell curve of judicial philosophies, policy priorities, or political ideologies. Three or more judges is sufficient to make up a panel or at least a majority in a number of panels. The chance of being confronted with a panel "that does not believe in fee-shifting statutes," or "who never met a handgun

157. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 18, 34–35 (1960).

158. *Id.*

159. Carrington, *supra* note 156, at 210. Knowing the panel is even more difficult, because panel composition is not made public until only days prior to argument.

160. Tjoflat, *supra* note 122, at 72–73.

161. Carrington, *supra* note 156, at 210. *But see* Carrington, *supra* note 7, at 139.

they didn't like," or (as is more often mentioned in connection with the Ninth Circuit) is very liberal or very conservative, is therefore greater than on a smaller court. Further, observation of the court suggests that on some matters, the views of the judges are not shaped like a bell curve, but are instead sharply polarized.¹⁶²

Outlier panels and polarization can cause significant problems with consistency and predictability. If an issue has not been explored previously or is very fact sensitive, lawyers may be unable to rely on clues or general themes from opinions on other subjects to be sure any particular panel will decide the issue any particular way, making the court difficult to predict. If a multiprecedent issue is involved, the panel may simply choose one or the other of the available approaches and not publish its opinion, as discussed below, creating both practical consistency and predictability problems.¹⁶³ It is understandable why lawyers trying to puzzle out the law of the circuit and conform their arguments to it might grumble that "Las Vegas is the capital of the Ninth Circuit."¹⁶⁴

162. What appears as polarization on the Ninth Circuit would be an outlier judge on a smaller court because the Ninth Circuit is so large. Polarization does not necessarily mean the Ninth Circuit is split evenly on a matter. If six judges on the court think the invited error doctrine no longer exists in the circuit, for example, they may make up only one-third of the circuit, but they can publish a lot of opinions on the matter and control an en banc panel, although not many other circuits would agree. Compare *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (en banc) (six judge majority with five judges concurring), with *United States v. Tandon*, 111 F.3d 482, 487-89 (6th Cir. 1997), *United States v. Balter*, 91 F.3d 427, 434 (3d Cir. 1996), *United States v. Mitchell*, 85 F.3d 800 (1st Cir. 1996), *United States v. Griffin*, 84 F.3d 912, 923-24 (7th Cir. 1996), and *United States v. Hardwell*, 80 F.3d 1471, 1487 (10th Cir. 1996). The *Perez* en banc majority of merely six judges held that invited error doctrine should be limited to situations where a party has intentionally relinquished a known right to a different trial procedure or jury instruction, and therefore, plain error review is available unless a party submits jury instructions knowing he would be entitled to other instructions under the law. By contrast, the five-judge concurring opinion, along with the five circuits cited above, the only circuits to have considered the issue, confirm that when a party requests an instruction or a certain procedure, and that instruction or procedure turns out to be error, review on appeal is unavailable whether the requesting party knew he was entitled to a different instruction or not, because the requesting party invited the trial judge's error. Relevant to the polarization issue, *Perez* demonstrates that with a limited en banc procedure, a mere one-third of the Ninth Circuit can and does hand down en banc decisions that are national outliers. Two judges on a panel may do the same thing, even for this twenty-two judge court. A third of a six-judge court, such as the first circuit, could barely control a panel, but a third of an eighteen-judge court, or even a twenty-eight-judge court with a limited en banc process, can control many panels and en bancs.

163. Tjoflat, *supra* note 122, at 72.

164. Carrington, *supra* note 156, at 210. *But see Baker, supra* note 2, at 91-92. Professor Hellman has done a useful study indicating that there are many fewer decisional inconsistencies than all the carping from lawyers might suggest. *See generally* Hellman, *supra* note 109. The study has several weaknesses, however. First, it analyzes only published work. Because at least 75% of the

Worse, the size of the Ninth Circuit means that the idiosyncrasies of individual judges are less likely to be mitigated by institutional constraints. Ninth Circuit panels are not tempered by an institutional voice, for example, because without a full court en banc at least setting a tone, the institution itself never speaks.¹⁶⁵ Nor does even a significant portion of the institution speak on a regular basis. On a six-judge court, or even a ten-judge court, a three-judge panel is a significant part of the court. Therefore, a significant part of the court speaks every time a panel hands down a decision. On a twenty-two, or worse, a twenty-eight judge court, an individual three-judge panel is hardly noticeable in the cacophony—except, of course, to the litigants whose fates have been determined by that panel.¹⁶⁶ Panels don't just have autonomy on the Ninth Circuit; they are structurally prone to becoming independent operators because of weak institutional constraints.¹⁶⁷ A pair of smaller institutions could exert more control over their respective members without changing a single internal procedure.

4. *Workload Redux: Rolling the Dice on Appeal*

These problems have a workload component also. Lack of consistency and predictability in a circuit's law encourages appeals to take advantage of the uncertainty.¹⁶⁸ Because there is a good chance of running into an outlier panel or a panel reflective of one of the court's polarizations, even lawyers with weak cases have a strong incentive to "roll the dice" on

court's decisions are unpublished, concentrating on only published work may hide the extent of the consistency problem, despite the fact that unpublished decisions are often made on the "easiest" cases, by allowing a panel to hide inconsistency. This would explain why the Ninth Circuit appears relatively consistent in F.3d, but lawyers do not see it that way. The average attorney trying to figure out not just what the law says, but also how his or her case will actually be decided, is going to be paying attention to what the court does with unpublished dispositions. Unfortunately, their results are all over the map. Second, due to the practical difficulties of conducting such a study, Professor Hellman leaves out many of the classes of decisional disharmony, such as conflicting dicta, which bear on the outcomes of future cases. One would see much more decisional disharmony if one applied a less exacting standard for inconsistency than Professor Hellman. Meador, *supra* note 39, at 200.

165. See Tjoflat, *supra* note 122, at 71.

166. Worse, there are very few three-judge panels of active judges, because so many Ninth Circuit panels include at least one senior or visiting judge.

167. Judge Wilkinson states: "As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. Indeed, it is likely that the law of the circuit will be replaced by the law of the panel." Wilkinson, *supra* note 105, at 1176.

168. Tjoflat, *supra* note 122, at 71; Wilkonson, *supra* note 105, at 1175.

appeal and hope the random draw of panel judges comes out in their favor. After all, the Ninth is a circuit of judges that Chief Justice William Rehnquist once described as having “a hard time saying ‘no’ to any litigant with a hardluck story.”¹⁶⁹ As the award winning movie *The Shawshank Redemption* pointed out, “hope is a good thing; maybe the best of things,”¹⁷⁰ but in real life, hope does little to control caseloads.

C. *The Icebox Split Would Facilitate Collegiality*

Ninth Circuit Chief Judge Procter Hug, Jr. recently told a symposium at the University of Montana School of Law that even during the period when the court grew from thirteen to twenty-eight judges, he had “enjoyed some of the finest professional and collegial relationships in [his] entire life.”¹⁷¹ The Ninth Circuit has been fortunate to have leadership at the top in the collegiality department, particularly during Chief Judge Hug’s tenure. Nevertheless, the Hruska Commission predicted as early as the mid-1970s that maintaining collegiality on large circuits would be a challenge.¹⁷² Judge Tjoflat’s experience on the larger former Fifth Circuit suggests that the Commission was right.¹⁷³ Both Chief Judge Wilkinson and Chief Judge Harry T. Edwards have written that collegiality is probably an inevitable casualty of jumbo circuits.¹⁷⁴ Ninth Circuit Judge Diarmuid O’Scannlain has cited the risk to collegiality as an argument in favor of a Ninth Circuit split.¹⁷⁵ Oral statements from judges are just one type of evidence of interpersonal relationships between the judges, however. Nevertheless, we need not eavesdrop on internal communications to hear discord in the ranks because the judges have put quite enough of their differences right in F.3d.¹⁷⁶

What follows are excerpts from opinions in extremely complicated and highly controversial cases, each of which sent the Ninth Circuit into an uproar. They are not examples of a lack of collegiality themselves, but

169. James B. Stewart, *Judicial Mavericks: Ninth Circuit’s Judges Frequently Run Afoul of the Supreme Court*, Wall St. J., Dec. 19, 1984, at A1.

170. *The Shawshank Redemption* (Castle Rock Entertainment 1994).

171. Hug, *supra* note 30, at 299.

172. *Hruska I*, *supra* note 40, at 57.

173. Tjoflat, *supra* note 122, at 70.

174. *Id.* (quoting Judge Harry T. Edwards); Wilkinson, *supra* note 105, at 1173.

175. *See, e.g.*, O’Scannlain, *supra* note 95, at 948.

176. *See infra* Parts III.C.1–3.

rather are tips of the iceberg: evidence of what the judges must think and feel behind the scenes.¹⁷⁷ A full reservoir of collegial capital built up over time will smooth over these rough periods, but the harshness in the Ninth Circuit's recent opinions suggests that its reservoir may be running dry.

1. *Adventures with Full Court En Banc: Compassion in Dying v. Washington*

Since adoption of the limited en banc option in 1978, the Ninth Circuit has never voted for a full-court en banc hearing in any case.¹⁷⁸ The most recent attempt was *Compassion in Dying v. Washington*, a case concerning the constitutionality of a Washington law to ban assisted suicide.¹⁷⁹ *Compassion in Dying* was an "event" for the Ninth Circuit. It pushed the court to the procedural brink, and things understandably became heated along the way.

The case was controversial from the beginning. The subject matter—assisted suicide—is not just a current hot-button issue. In this case, it forced a major constitutional showdown over whether there were unenumerated fundamental rights not yet recognized and how one would determine what they were. When the court announced the randomly chosen three-judge panel that would hear the case, attorneys for the groups opposing the ban complained that law would not decide the matter because Judges John Noonan, Jr. and Diarmuid O'Scannlain, well-known as Roman Catholics, were too biased to decide the case fairly.¹⁸⁰ Of course, the court did not change the panel, and Noonan and

177. The mere fact that a judge uses strong language in an opinion is not necessarily wrong. Many judges quick to jump into the fray are some of the most outstanding jurists in the country, and their unwillingness to sugar-coat matters is evidence of their seriousness. On the other hand, strong language also means that judges are being pushed very hard, and the institutional check of collegiality is not functioning to hold them back at some crucial times. Things are being said publicly that judges may find very difficult to forgive later, however justifiable. Ask yourself how quickly you would recover from some of the rhetoric in Ninth Circuit opinions if it were directed at work or views of which you were proud, in some cases by people you do not like very much, and then ask yourself what the collegiality situation must be like. See Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 *Judicature*, June-July 1991, at 27.

178. *Compassion in Dying v. Washington*, 85 F.3d 1440, 1441 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (O'Scannlain, J., dissenting from decision not to rehear case by full court en banc).

179. *Id.*

180. The appellants' legal case was based substantially on abortion rights cases. The appellees noted that Judge Noonan has written numerous articles and books criticizing those cases. Not long afterwards, Judge Noonan published a one-judge order in a different case explaining what should

O'Scannlain did form the majority upholding the law.¹⁸¹ As the Supreme Court would point out later, their decision was correct under the law.¹⁸² Nevertheless, the controversy over the panel's composition was not an auspicious beginning for either the court or the legal issues in the case.

The court decided to rehear the case en banc, and some of the limited en banc panel's criticisms had the unfortunate side effect of reinforcing the appellees' criticisms of the three-judge panel. The en banc court compared the panel unfavorably with the district court in its failure to be sufficiently "dispassionate and traditional" in its analysis of the state's interests in preventing assisted suicide.¹⁸³ The three-judge panel felt the assisted suicide ban was justifiable because it protected the poor and minorities from possible exploitation; but, the en banc panel responded that "[t]his rationale simply recycles one of the more disingenuous and fallacious arguments raised in opposition to the legalization of abortion. It is equally meretricious here."¹⁸⁴ Another panel conclusion was termed "ludicrous."¹⁸⁵ The en banc opinion concluded that those opposing physician-assisted suicide "are not free . . . to force their views, their religious convictions, or their philosophies on all the other members of a democratic society."¹⁸⁶ As luck of the en banc panel draw would have it, none of the three-judge panel members were on the en banc panel to defend its decision or one another.¹⁸⁷

have been unnecessary in the 1990s—that Roman Catholic judges are competent to decide cases about or related to abortion issues. *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399 (9th Cir. 1995).

181. *Compassion in Dying v. Washington*, 49 F.3d 586, 588 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

182. *Glucksberg*, 117 S. Ct. 2258. In another twist of fate, Washington state actually had one of its judges on the original three-judge panel, Eugene Wright, and he dissented from the panel's decision. *Compassion in Dying*, 49 F.3d at 594.

183. *Compassion in Dying*, 79 F.3d at 817.

184. *Id.* at 825 (footnote omitted).

185. *Id.* The en banc Court concluded that it was "ludicrous on its face" that "disadvantaged persons will receive *more* medical services than the remainder of the population in one, and only one, area—assisted suicide." *Id.* The three-judge panel had reasoned that the State had a legitimate interest in protecting minorities from exploitation by physicians who encourage them to take advantage of assisted suicide to reduce the cost of public assistance. *Compassion in Dying*, 49 F.3d at 592.

186. *Compassion in Dying*, 79 F.3d at 839.

187. *Id.* at 793.

Apparently a call for full court en banc was made but failed to attract enough votes.¹⁸⁸ Judge O’Scannlain’s dissent from this decision hit back hard against the en banc panel’s reasoning that had excoriated his own.¹⁸⁹ He stated that *Planned Parenthood v. Casey*¹⁹⁰ was “a perniciously thin reed upon which to rest the majority’s radical holding;”¹⁹¹ “the majority draws an absurd parallel” in comparing assisted suicide with abortion,¹⁹² and the en banc panel’s holding was “nothing short of pure invention—constitutionally untenable and historically unprecedented.”¹⁹³

Compassion in Dying was an extremely important case with grave consequences. Understandably, the judges cared a great deal about the outcome,¹⁹⁴ and it was no wonder tempers flared a little. *Compassion in Dying* is not notable for uncollegial rhetoric; however, it is notable because the strong language in it is commonplace.

2. Coalition for Economic Equity v. Wilson: *A Lecture on Stare Decisis*

Almost everything about the panel’s work on the groundbreaking affirmative action case, *Coalition for Economic Equity v. Wilson*, was remarkable.¹⁹⁵ *Coalition* raised the issue of whether a recent California constitutional amendment, passed by initiative (Proposition 209), which prohibited public race and gender preferences, was consistent with the federal constitution.¹⁹⁶ Again, “luck of the draw” produced an amusing twist that must confirm that Ninth Circuit panels are randomly chosen. No one worried about public relations or political correctness on the court would have chosen this panel: Republican-appointed judges Diarmuid O’Scannlain, Edward Leavy, and Andrew J. Kleinfeld, none of

188. *Compassion in Dying v. Washington*, 85 F.3d 1440 & n.71 (9th Cir. 1996), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

189. *Id.* Judge John Noonan wrote the panel opinion and Judge O’Scannlain joined it. *Compassion in Dying*, 49 F.3d at 592.

190. 505 U.S. 833 (1992).

191. *Compassion in Dying*, 85 F.3d at 1443–44 (O’Scannlain, J., dissenting).

192. *Id.* at 1444.

193. *Id.* at 1446.

194. For example, the en banc majority devoted almost 50 pages to the decision, and dissents added 20 more. *See Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

195. 122 F.3d 692 (9th Cir. 1997).

196. *Id.* at 711.

whom are from California, the state where the law under attack in the case originated. Further, the panel first encountered jurisdiction of the case while sitting as a screening panel when the district court refused to stay a preliminary injunction barring application of the provision and that decision was appealed.¹⁹⁷ Screening panels usually address truly routine cases.¹⁹⁸ The panel was justified in retaining jurisdiction to decide the appeal of the preliminary injunction on the merits because it had already invested considerable judicial resources in the stay issue,¹⁹⁹ but the action did provoke comment.

The panel concluded that Proposition 209 was consistent with the U.S. Constitution, vacated the preliminary injunction, and denied the requested stay.²⁰⁰ Apparently someone called for en banc rehearing of the case and the effort failed.²⁰¹ Four judges dissented in a published opinion.²⁰² Those judges read the relevant Supreme Court precedents differently from the panel, and concluded that “the panel holds that the measure is constitutional . . . in violation of its duty to follow controlling Supreme Court precedent.”²⁰³ Judge Norris’s dissent, with which three judges concurred, criticized the panel for “inject[ing] into [the] analysis a test that looks to the personal views of individual judges about the relative merits of affirmative action programs and antidiscrimination laws.”²⁰⁴ He found certain of the panel’s arguments “remarkable,” and that the panel “puts its own spin” on others.²⁰⁵

197. *Id.* at 698–99 & n.5.

198. The Ninth Circuit hears preliminary injunctions in screening panels, regardless of their importance, because preliminary injunctions are especially time sensitive.

199. *See* Gregorio T. v. Wilson, 54 F.3d 599 (9th Cir. 1995); *see also* 28 U.S.C. § 1657 (1994); 9th Cir. R. 3-3.

200. *Coalition for Econ. Equity*, 122 F.3d at 711.

201. *Id.* (rejecting suggestion for rehearing en banc).

202. The fact that four judges dissented in a published opinion says nothing of how many voted for or against en banc rehearing. These four either wrote or joined a written dissent, but judges regularly vote against rehearing a case en banc without publishing an opinion later to explain why.

203. *Coalition for Econ. Equity*, 122 F.3d at 713 (Norris, J., dissenting from decision not to rehear case en banc); *see also id.* at 717 (Hawkins, J., commenting on decision not to rehear case en banc) (noting that while panel may well have correctly predicted direction of Supreme Court decisionmaking, controlling precedent at time of decision required opposite result).

204. *Id.* at 716.

205. *Id.* Ninth Circuit dissents are full of phrases such as “this remarkable argument” or “that novel approach.” *See, e.g.,* Monterey Mechanical Co. v. Wilson, 138 F.3d 1270, 1275 (9th Cir. 1998) (Reinhardt, J., dissenting); *Coalition for Econ. Equity*, 122 F.3d at 716; *Thompson v. Calderon*, 120 F.3d 1045, 1065 (9th Cir. 1996), *rev’d in part*, 118 S. Ct. 1439 (1998) (Hall, J., dissenting); *id.* at 1060–61 (Reinhardt, J., dissenting); *Compassion in Dying v. Washington*, 85 F.3d

Judge Norris then launched into a lecture to his more junior colleagues on the *Coalition* panel about the burdens of stare decisis that they cannot have appreciated. He stated:

Faithful adherence to precedent does not always come easily. . . . We must sometimes implement precedent that comes into conflict with our most deeply held personal convictions. . . .

It is the responsibility of *all* federal judges, however, to “struggle to accept [that burden].”²⁰⁶

The Norris dissent concluded that “the *Coalition* panel has neglected this duty in favor of a path of conservative judicial activism.”²⁰⁷

Obviously those who dissented in writing from the decision not to rehear the case en banc disagreed strongly with the panel decision; they would not have written otherwise. The stare decisis section of Judge Norris’s dissent can have performed little service other than to vent frustration that the law was being interpreted differently from how he would have done it. Unfortunately, that venting may have damaged interpersonal relations between colleagues who must continue to work together long after Proposition 209 becomes deeply imbedded in California’s constitutional structure.

3. Harris v. Vasquez and Thompson v. Calderon: *Adventures in Death Penalty Jurisprudence*

Someday when the history of the decline in Ninth Circuit collegiality is written, the cases brought by Robert Alton Harris, who in 1992 became the first man to be executed in the Ninth Circuit states in many

1440, 1444 (9th Cir. 1996) (O’Scannlain, J., dissenting), *rev’d sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997). Such language, while sometimes appropriate under the circumstances, no doubt stings the author of analysis under critique. Possibly the writers forget what they sound like to the judges who crafted the “remarkable” or “ludicrous” language under attack. Perhaps the writers’ ears become dulled; they have said and heard them so often themselves. In any event, the arguments so called are rarely remarkable; for the most part, they are simply the opposite side of the jurisprudential coin. As Justice Ginsberg has written, “one must be sensitive to the sensibilities and mindsets of one’s colleagues, which may mean avoiding certain arguments and authorities, even certain words” such as “folly,” “ludicrous,” “outrageous,” words which frequently show up in dissenting opinions. Ruth Bader Ginsberg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1194–95 (1992); see also Posner, *supra* note 126, at 353–54; Seitz, *supra* note 177, at 27.

206. *Coalition for Econ. Equity*, 122 F.3d at 717 (citations omitted).

207. *Id.*

years,²⁰⁸ may well loom as a turning point. Ninth Circuit judges issued four stays of Harris' execution, after which the Supreme Court forbade the lower courts from entering any more.²⁰⁹ At least one was issued when Harris was already in the gas chamber.²¹⁰ Some judges seemed to turn on their colleagues who believed the law allowed Harris's execution. In a *Yale Law Journal* article Ninth Circuit Judge Stephen Reinhardt wrote that the panel opinion vacating a district court stay of Harris's execution "was a one-time opinion, good for Robert Alton Harris only. Nevertheless, it accomplished its purpose."²¹¹ This and other rhetoric made it sound as if the panel members looked forward to Harris's execution. Other judges excoriated the Supreme Court; Judge John Noonan called the Court's stay ban "treason" to the Constitution.²¹² It was not a happy moment for the Court.

Nor was the *Harris* case an isolated incident. Every death penalty case is an adventure on the Ninth Circuit. Perhaps the most bizarre episode occurred just last year in *Thompson v. Calderon*.²¹³ Two judges apparently missed a court-imposed deadline to call for en banc consideration in Thompson's death penalty habeas corpus appeal, perhaps due to an error in their office filing systems or perhaps due to a malfunction in the circuit's e-mail system.²¹⁴ We may never know for sure. The case ultimately went en banc, "to consider whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice."²¹⁵

In the opinions the *Thompson* en banc process produced, judges quarreled over three issues. The first was whether the panel made an unprecedented refusal to allow a late en banc call or whether those wishing to call for en banc failed to follow well-established procedures to get an extension.²¹⁶ This spectacle provoked one judge to reassure the

208. See Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 *Yale L.J.* 225, 225 (1992); see also *Harris v. Vasquez*, 961 F.2d 1449 (9th Cir. 1992).

209. See Reinhardt, *supra* note 125, at 209–14.

210. *Id.* at 212–15.

211. *Id.* at 208.

212. See Carlsen, *supra* note 26.

213. 120 F.3d 1042 (9th Cir. 1997) [*Thompson I*], *rev'd in part*, 118 S. Ct. 1489 (1998).

214. *Thompson v. Calderon*, 120 F.3d 1045, 1061 [*Thompson II*], *rev'd in part*, 118 S. Ct. 1489 (1998). This is what Judge Reinhardt implies in his concurrence. I do not know and since no one conclusively says one way or the other in print, I could not say if I did know.

215. *Thompson I*, 120 F.3d at 1043.

216. *Thompson II*, 120 F.3d at 1065 (Hall, J., dissenting); *id.* at 1067 (Kozinski, J., dissenting).

mob that “[n]o one will ever get my vote to execute an innocent man because a judge or a lawyer missed a deadline.”²¹⁷

The second issue was whether the en banc panel overstepped its own mandate on en banc by deciding the merits of the appeal.²¹⁸ Dissenters from the decision to go en banc warned that the en banc court would decide the merits, which was contrary to their understanding of the en banc order.²¹⁹ The en banc majority ultimately agreed that it had decided the merits of the appeal appropriately.²²⁰ Two judges then filed orders showing that they too had dissented from the decision to go en banc—after the en banc opinion came down!²²¹

The final issue was the sticky procedural problem of whether recalling the mandate would give Thompson an unwarranted second bite at the habeas corpus apple under the Antiterrorism and Effective Death Penalty Act of 1996.²²² The legitimacy of taking the case en banc at all had rested on the assumption that Ninth Circuit judges had made procedural errors, and therefore, the court was “acting not upon the basis of Thompson’s petition, but upon the basis of our sua sponte determination to remedy our own errors.”²²³ A scuffle broke out, however, when Judge Kozinski’s dissent quoted liberally from five separate memoranda circulated on the court’s internal electronic mail system²²⁴ in order to establish that the panel’s conduct, the en banc process, and the issuance of the mandate had occurred within the rules and there had been no “errors” to justify recalling the mandate.²²⁵ Judge Kozinski’s dissent was a revealing look at internal workings of the court, particularly when it argued that some statements by members of the majority were perhaps “contrary to fact.”²²⁶ The dissent served its purpose, but it did so at the expense of breaking an ironclad rule of confidentiality that allows judges to speak

217. *Id.* at 1072 (Kleinfeld, J., dissenting).

218. *Id.* at 1048–51.

219. *Thompson I*, 120 F.3d at 1045 (Rymer, J., dissenting from decision to rehear case en banc).

220. *Thompson II*, 120 F.3d at 1051.

221. *Thompson I*, 120 F.3d at 1045 (orders of Fernandez & Rymer, JJ.).

222. *Thompson II*, 120 F.3d at 1064 (Hall, J., dissenting).

223. *Id.* at 1049 (citing 28 U.S.C. § 2244 (Supp. II 1996)).

224. The court communicates almost exclusively by an internal electronic mail system. E-mail is quicker than regular mail, less laborious than fax machines, and has the benefit of allowing all judges involved in a matter to be informed on all issues. Judges may occasionally call each other on the phone, but this should occur rarely where court business is at issue.

225. *Thompson II*, 120 F.3d at 1067–69.

226. *Id.* at 1068 n.3 (Kozinski, J., dissenting).

freely during deliberations, a violation of “judicial privilege.” Judge Kozinski did something that simply is not done, and that judges trust will not be done.²²⁷ Yet, the primary issue in this case was whether internal procedures had occurred the way the majority said they had. These were issues that judges were not supposed to talk about in public; but in *Thompson*, if you could not talk about internal communications, you could not talk relevantly at all. The legitimacy of the entire en banc proceeding rested on the substance of those internal memoranda. History and its colleagues will judge the magnitude of the breach.

Judge Reinhardt fired back furiously that Judge Kozinski’s dissent was an “unfortunate document,” and that “[p]erhaps to those who read his recent musings in *The New Yorker* magazine regarding his personal experiences in voting in death penalty cases, Judge Kozinski’s rambling analysis will come as no surprise.”²²⁸ Judge Reinhardt stated that some of Judge Kozinski’s arguments against heightened procedural safeguards in capital cases were “bizarre and horrifying,” and “unworthy of any jurist.”²²⁹ He contradicted the inferences from the memoranda Judge Kozinski had quoted. He denied that the court operated the way Judge Kozinski’s quoted communications suggested. He pointed out that “[t]he reader might be surprised to read, for example, the contents of a communication from Judge Kozinski in this case, if I were uncollegial enough to include it in this opinion.”²³⁰

From beginning to end, *Thompson* was an unmitigated disaster for the court. The Supreme Court has since held that the Ninth Circuit abused its discretion when it recalled the mandate in *Thompson*.²³¹ Time will tell if the case leaves an interpersonal tangle that is more difficult to put right.

227. Judge Kozinski clearly felt provoked to reveal internal communications by what he believes was a breach of greater magnitude by the majority on the en banc panel, and it is notable that he did attract a second judge highly respected for collegiality, Thomas G. Nelson, to join his opinion. The opinions in the *Thompson* cases are not examples of “uncollegiality” themselves, but rather are evidence of deeper, disconcerting rifts on the court.

228. *Thompson II*, 120 F.3d at 1060 (Reinhardt, J., concurring). Judge Reinhardt was referring to Alex Kozinski, *Tinkering with Death*, *New Yorker*, Feb. 10, 1997, at 48, 48.

229. *Thompson II*, 120 F.3d at 1060 (Reinhardt, J., concurring).

230. *Id.* at 1062 n.3 (Reinhardt, J., concurring).

231. *Calderon v. Thompson*, 118 S. Ct. 1489 (1998).

4. *Intemperate Language Reveals Problems of Collegiality*

These cases do not and should not inspire confidence. The price of this sort of behavior is high, and it does not matter whether the Ninth Circuit is worse than other circuits on the collegiality front for one to conclude that these public displays of distemper are not acceptable in the long run. First, a collegial atmosphere on a court probably improves the quality of its work product, which is better for all who must live under the law that court hands down. As Chief Judge Wilkinson has argued:

Collegiality may be the first casualty of expansion on the federal appellate courts. I recognize that to speak of collegiality may have a quaint and antique ring. Collegiality is one of those soft, intangible words which may ring hollow upon the congressional ear. Judges, however, have a deep conviction that a collegial court does a better job.

. . . .

Of course, I cannot demonstrate empirically that the quality of decisionmaking is better on a circuit court that does not number in the dozens, and I recognize that strained relationships are as possible in smaller bodies as in larger ones. I believe nonetheless that at heart the appellate process is a deliberative process, and that one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions. Smaller courts by and large encourage more substantial investments in relationships and in the reciprocal respect for differing views that lie at the heart of what appellate justice is about.²³²

Second, to the extent that intemperate language degenerates into personal attacks, it makes future agreement and trust all the more difficult.²³³ Further, as Judge Harrison Winter of the Fourth Circuit has pointed out, intemperate language undermines public respect for the judiciary more generally:

232. Wilkinson, *supra* note 105, at 1173–74 (footnotes omitted).

233. Harrison L. Winter, *Goodwill and Dedication*, in *Federal Appellate Judiciary in the Twenty-First Century* 169 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

[A] court is a very fragile institution. We couldn't possibly go out and enforce all of our decrees and all of our judgments. We don't have the staff; the marshals could not do it. Our effectiveness depends upon people accepting our judgments and abiding by our decisions willingly. We rely on public confidence and public acceptance. When the public sees that we're hurling words that verge on insult, especially on a point about which there can legitimately be an intellectual difference, we destroy the very basis on which we must ultimately depend.²³⁴

The problems intemperate language create are the problems of a lack of collegiality more generally.

5. *Shortage of "Face Time": Too Many Judges Too Far Apart*

Why is collegiality a challenge on the Ninth Circuit that seems to bubble up at inconvenient moments? A fairly junior judge once told me a story about how collegiality can be born and grow even in the face of strong disagreement. The junior judge was scheduled to serve on a week-long, three-judge panel with a more senior and more influential judge with whom he had two public disagreements, one about a court administration matter and the other about an legal issue under en banc consideration on which the junior judge had taken a leading role on the minority side. The two judges had not sat together on a regular week-long calendar in recent memory, and worse, a number of cases they were scheduled to hear raised issues very similar to the en banc issue. Needless to say, the more junior judge was looking forward to the week with some trepidation.

Listening to the more senior judge question attorneys on the first day of argument, the junior judge was struck with disbelief. The senior judge seemed to have modified his view on the en banc issue! It turned out that the senior judge's view was not what the junior judge had previously understood it to be, and after a week of talking out several cases together, the more junior judge's view became more congruent with that of his more senior colleague. When they got back to their chambers, the senior judge joined the more junior judge's separate opinion in the en banc case. Others followed the more senior judge's lead, changing the impact of the ultimate majority opinion. The junior judge and the senior judge continued their disagreements on other matters, but discovered they

234. *Id.*; see also Ginsberg, *supra* note 205, at 1194.

could work together more easily on them than before. What made the difference? The junior judge's view was that "face time," or the opportunity to get to know each other better both professionally and personally over the course of a week, had turned the tide.²³⁵

Everyone talks about how important collegiality is on courts, but it is not easy to attain. Unlike many employment situations, judges have little ability to choose their colleagues, but are forced frequently to disagree and critique each other's performance. As Chief Judge Richard Posner has put it, "To be an appellate judge is a little like being married in a system of arranged marriage with no divorce."²³⁶ Under those conditions, collegiality and even civility are hard work. Judge Patricia Wald of the D.C. Circuit has noted that judges would be well advised to make affirmative efforts to stay in touch with their colleagues at a social level in order to get the face time necessary to maintain collegial relations.²³⁷ "Even in the same building, months can go by if one does not make a conscious effort to keep in touch socially."²³⁸

Unlike judges on the D.C. Circuit, Ninth Circuit judges are not all in the same building, so they do not have the luxury of going out to lunch once a week to stay in contact. Ninth Circuit judges are the most far-flung of all appellate courts in the country. Even their "forced" social activities such as Christmas parties, court meetings, and judicial conferences are just a drop in the collegiality bucket. People do not get to know and respect each other in the deeply rooted ways that help them get through tough challenges, such as *Compassion in Dying* or *Thompson v. Calderon*, over a fifteen-minute cocktail. Calendars and screening panels are the best opportunities for the kind of extensive "face time" necessary to resolve real-life disputes, providing practice, if you will, in relatively low pressure situations, needed to promote the true understanding leading to genuine collegiality that will stand up when times get tough.²³⁹

235. See also Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 Tex. L. Rev. 1485, 1498 (1995) ("Collegiality results from familiarity and from working closely with other members of the court; these work experiences will necessarily decline as the court's size expands.").

236. Posner, *supra* note 126, at 355.

237. Patricia M. Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, in *Federal Appellate Judiciary in the Twenty-First Century*, *supra* note 233, at 181.

238. *Id.*

239. Jones, *supra* note 235, at 1498. Unfortunately, each Ninth Circuit judge sits on only seven regular panels and two screening panels per year, and often those screening panels are conducted via conference calls.

Unfortunately, because there are so many Ninth Circuit judges, it is conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. A number of senior and active judges may never have sat on a regular or screening panel with the junior judges appointed in the 1990s. The problem is made worse by the fact that the Ninth Circuit relies on so many district and other visiting judges to fill out panels. This means that, instead of getting face time with two Ninth Circuit colleagues on any given panel, the average panel provides the opportunity to get to know only one other active colleague, if any. Appointing more judges, the oft-mentioned solution to the Ninth Circuit's ills that would put more active judges on panels,²⁴⁰ would actually make matters worse. It is simply tough to get around to all your colleagues when there are so many of them.²⁴¹

The real problem, therefore, is not that Ninth Circuit judges are unpleasant people, or socially awkward, or modern Howard Hughes-type hermits. Every Ninth Circuit judge I met while clerking was remarkably charming, devoted to the best aspects of his or her work, and seemed genuinely interested in making the Ninth Circuit a pleasant place to work. The real problem is that there are too many judges too far apart. Even a collection of the most socially adept characters could not overcome this structural problem. Two smaller collections of judges will each be more collegial than one large collection.²⁴²

6. *The "Cocoon Problem": Another Reason Why Adding More Staff Only Makes Matters Worse*

Collegiality problems tend to feed on themselves, and adding more staff will not alleviate these problems. Ask the average U.S. Senator who retired in the 1990s because the institution had lost some of its collegiality and civility²⁴³ why it happened and each will have a number of reasons. Sooner or later, most will mention the proliferation of both central and personal staffs. Staff creates a "cocoon" around the senator, taking over many of the inter-office communications and other tasks that

240. This is the solution many Ninth Circuit judges prefer. See, e.g., Hug, *supra* note 30, at 292; Reinhardt, *supra* note 100, at 52. In 1998, the Senate confirmed three new Ninth Circuit judges.

241. Tobias, *supra* note 41, at 590.

242. See Jones, *supra* note 235, at 1498; Wilkinson, *supra* note 105, at 1173.

243. Collegiality, civility, courtesy: these are some of the proudest hallmarks of the U.S. Senate, and their degeneration is disappointing. See generally Norman Ornstein et al., *The Contemporary Senate*, in *Congress Reconsidered* 16-18 (Lawrence Dodd & Bruce I. Oppenheimer eds., 1981).

used to be done face to face, effectively isolating each senator from his or her colleagues. No longer are senators' closest and most regular professional interpersonal relationships with their colleagues; instead, they are with trusted staff members and advisors.

The same becomes true for many judges, which is part of the reason simply increasing the size of a judge's staff to solve workload problems would ultimately be a double-edged sword.²⁴⁴ Judicial staffs cannot expand as quickly as senate staffs, but the nature of the job of judging, particularly where judges are so physically removed from each other, is such that judges increasingly lose regular contact with their former colleagues or those relationships become stilted. As a practical matter, some judges may find it hard work to get along with other judges. Judges' staffs, on the other hand, are generally made up of the same types of talented and intriguing people that the judges find interesting; this is one of the reasons the judge hired them. Further, one of the jobs of a judicial staff member is to support and admire the judge for whom he works. No wonder easy staff relationships eventually take the place of the more complicated relationships with colleagues.

As in the Senate, work between chambers on courts of appeals sometimes gets done at a "staff level." Some is informal: Judge X's secretary telephones Judge Y's secretary to mention that a cosmetic change is necessary in Judge Y's most recent opinion, and the change is made, possibly without consulting Judge Y, because Judge Y's secretary "knows how he likes to handle these matters." Sometimes it is formal. For each case heard by a three-judge panel, one judge's chambers is chosen to write a bench memorandum to be circulated to the other chambers. Some judges use them and others rely on their own staff's summaries. Some judges take the opportunity bench memoranda provide to get their views on the case across and others give their clerks a free hand to write their own views.

As Paul Carrington, Daniel Meador, and Maurice Rosenberg warned more than twenty years ago in *Justice on Appeal*, the proliferation of personal and central staff has changed the character of courts.²⁴⁵ Judges more and more resemble administrators instead of craftsmen, not

244. The other reason, alluded to earlier, is the inefficiency of increased bureaucratization on the court. See *supra* Part III.A.5.

245. Carrington, *supra* note 7, at 45–46; Posner, *supra* note 126, at 141, 145; see also Lauren K. Roebel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. Rev. 3, 41–43 (1990).

necessarily with positive results.²⁴⁶ They allow staff to write more and more of the work that goes out under their names.²⁴⁷ They also tend to confer more with their staffs rather than with their colleagues and may well have become less receptive to peer argument.²⁴⁸ They begin to look more like autonomous individuals—lone rangers, if you will—than group members. This kills off the institutional collegiality that has made American appellate courts work for two hundred years.

To varying extents, all circuits face these problems. Only changes in workload of a magnitude not contemplated in this Article, thereby eliminating the need for three or four clerks and two secretaries, could solve the cocoon problem directly, but adding more staff to solve workload problems would certainly exacerbate it. Splitting the Ninth Circuit into two smaller units could blunt some of the cocoon problem's impact, however. When the professional interpersonal relationships of the judges become less tight, it is natural that staff will wittingly or unwittingly step in to fill the void. This has the circular effect of insulating the judges from each other even more and exacerbating any collegiality problems that already exist. On a smaller court, judges get more face time with each other, and group decisionmaking for the court therefore becomes easier. The cocoon problem never develops fully, and matters never get worse as a result. It is really a chicken and egg problem, but solving such a problem is not really about which came first; killing either one kills off the entire chicken-and-egg process.

Almost all circuits have considerable staff; in fact, there are national standards about how many in-chambers staff members (secretaries and law clerks) a judge may have.²⁴⁹ The Ninth Circuit's problem is worse, however, because it has more central staff.²⁵⁰ Most of the Ninth Circuit's efficiency reforms that allow it to deal not just with excess workload, but also with a larger caseload, involve additional staff and additional staff activity on matters that judges would otherwise do themselves.²⁵¹ Adding in-chambers staff to address workload issues is also bound to backfire.

246. Carrington, *supra* note 7, at 45.

247. Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1446 (1983); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777, 787 (1981); Posner, *supra* note 126, at 143; Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 Tex. L. Rev. 1505, 1511 (1995).

248. Carrington, *supra* note 7, at 45–46.

249. See Posner, *supra* note 126, at 141 n.29.

250. See Meador, *supra* note 39, at 196–97.

251. See Hug, *supra* note 30, at 301.

The U.S. Congress's experience is that additional central staff resulted in more work, not less, because additional staff inspired new constituent service efforts, oversight projects and legislation.²⁵² Therefore, the additional central staff hired to help solve the Ninth Circuit's workload problem may have already made it worse, and there is no reason to think in-chambers staff would have a different impact. Further, since many judges' administrative responsibilities (such as serving as en banc coordinator) are so extensive, those judges may have the benefit of additional staff resources on a permanent, central, or ad hoc basis to help out. All these differences simply place more people in between judges at every step of the process.

7. *The Mini-legislature Problem*

It is easy to compare the number of filings in the Ninth Circuit with the paltry number of judges and wish President Clinton and Congress would figure out how to get more judicial personnel onto the Ninth Circuit, as they recently began to do.²⁵³ Yet, maybe the western states should be happy they do not have the judges they deserve. The Ninth Circuit would have twenty-eight judges if fully staffed. The Court has requested ten more, for a total of thirty-eight.²⁵⁴ Add to that the Ninth Circuit's complement of sixteen senior judges, and you have a larger court than the upper houses of many state legislatures. The Ninth Circuit is not a court; it is a congress.

Congresses are not just large courts, however. Chief Judge Posner and Judge Frank Easterbrook have written of the risk that large courts may begin to resemble legislatures, and the seeds have been sown on the Ninth Circuit.²⁵⁵ According to Judge Posner:

Plurality opinions, concurring opinions, shifting coalitions, frequent overrulings (many not acknowledged as such), inconsistent lines of precedent—in other words, the manifold institutional failings of appellate courts—are . . . the consequences of the fact that a multi-member court is an electoral body; for the theory of public choice teaches that electorates, and legislatures

252. See, e.g., Mark Bisnow, *In the Shadow of the Dome: Chronicles of a Capitol Hill Aide* 309 (1990); Congressional Q., Inc., *How Congress Works* 106 (1983).

253. After a dry spell of two years, Congress confirmed three Ninth Circuit appointees in the first four months of 1998 and another since then.

254. See O'Scannlain, *supra* note 59, at 315.

255. See Posner, *supra* note 126, at 364–68.

composed of elected representatives, cannot be expected to make rationally consistent decisions.²⁵⁶

Unfortunately, providing specific examples of what I interpret as the seeds of a legislative culture on the Ninth Circuit would require revealing confidential communications, but the mere size of the court is suggestive. So is the fact that many Ninth Circuit lawyers think that more than in other circuits, the composition of the panel will determine the outcome of the appeal.²⁵⁷ Chief Judge Posner explains the phenomenon as follows:

The model that [assumes legislative behavior in appellate courts] assumes that each judge is an individualist. The judge may consult with his colleagues before making up his mind but once he does make it up he will do everything he can to make the law conform to it. Almost my entire point in this chapter is that federal judges have too individualistic a conception of their role. If judges were more committed (emotionally, not just intellectually) to the idea of collective judicial responsibility; if, reminding themselves that judicial appointment is usually not purely meritocratic, they took themselves and their particular ideas and approaches less seriously; if they were more willing to give ground freely and to search for common ground in the way that a corporate task force might try to devise a marketing strategy for one of the corporation's products, then we would have a judicial system that generated less heat but more light.²⁵⁸

Individualistic, of course, is exactly what Ninth Circuit judges are.²⁵⁹ They tend to be isolated physically and imbedded in a cocoon by their staffs. And there are so many of them! They are ripe for the mini-legislature problem.

Why would a certain amount of legislative activity be such a bad thing on an appellate court? The desired institutional behavior of courts and congresses are different, as is the behavior of their individual members. Consider the following example. Judge A states she has decided to vote in favor of en banc in a case she would not normally consider en banc worthy, because Judge B had voted in favor of en banc in a prior case largely on the basis of Judge A's interest in the case, and Judge B is now

256. *Id.* at 364–65.

257. *Id.* at 137.

258. *Id.* at 365–66.

259. *See* Carlsen, *supra* note 26.

insistent that the current case go en banc.²⁶⁰ To anyone familiar with the wheeling and dealing that goes on in the average state legislature or the U.S. Congress, this example is tame. Standard operating procedure is for one legislator to vote for another legislator's bill in return for a "yes" vote on another bill. That is how deals are made.

The problem is that *appellate court decisionmaking is not about making deals*.²⁶¹ That is legislative activity. Legislatures operate by constructing and maintaining ever-shifting coalitions so that majorities, at any given moment on any given issue, may work their wills. Some legislatures make it easier or harder to do that based on their own concerns for minority views, but the point of the process is to varying degrees the same.²⁶²

These legislative goals simply do not have much to do with what courts are all about. Figuring out what the law is requires judges to vote on alternate possibilities from time to time, and it certainly requires a great deal of give and take. That has nothing to do, however, with the legislative goal of giving everyone something of what they want in order to keep the majority together.²⁶³ Federal judges should have no constituencies to please. By definition they have no seats to protect. All the give and take, all the redrafting, all the en banc calls—these are efforts to get to the truth of what the law says, to the "correct" result. Statesmanship abounds more than we think in our legislatures, and

260. Such an example is plausible, but has not, to my knowledge, ever occurred.

261. And neither, by the way, is my example. After all, Judge A did not promise a vote on Judge B's pet en banc in order to get Judge B's vote on his own en banc. Were the case slightly different, I would be arguing that Judge A should be commended for his zealous collegiality in terms of the respect he is showing publicly for Judge B's good judgment. There is a fine line between the two.

262. Compare, for example, the U.S. House of Representatives and the U.S. Senate. While the House follows majority rule both de jure and de facto, the cloture rule in the Senate means that body effectively has a 60% voting rule on many issues. See Standing Rules of the Senate, Rule 22.2, *Senate Manual*, 101st Cong. (1989). Due to a variety of rules, most Senate work must be done in practice by unanimous consent, which allows one senator to hold up the process for a very long time. See generally Walter J. Oleszek, *Legislative Procedures and Congressional Policymaking: A Bicameral Perspective*, in *Congressional Politics* 176, 176–77, 183–88 (Christopher J. Deering ed., 1989). An example is Senator Conrad Burns's decision to place a "hold" on all nominees to the Ninth Circuit until Congress splits the circuit. Burns, *supra* note 40, at 248. The House, on the other hand, has a committee that establishes temporary rules for the consideration of each bill that must be passed by a majority to go into effect. In other words, House business is conducted on terms acceptable to a majority of members, but not necessarily all. Oleszek, *supra*, at 178–83. The Senate is well understood to be a legislative body concerned with the rights and views of the minority, while the House is one set up so that the majority existing at any given moment has complete power to work its will. *Id.* at 176–77.

263. See Barbara Sinclair, *Majority Leadership in the U.S. House* 128–29 (1983).

congressmen care a great deal about what the “best” policy is; but, at the end of the day, their first concern has to be to produce the most popular result.²⁶⁴ If it ever was, the federal system is no longer a common law system in either the British or American state law sense. Federal judges do not “make” very much law; they take existing law, usually starting with a statute or the U.S. Constitution, and interpret what it means, relying on their own previous interpretations for guidance. Interpretation in this sense has a creative element, but it is quite limited. There is simply no need for legislative behavior on a U.S. appeals court.

The Ninth Circuit already demonstrates an unhealthy legislative tendency. Why, for instance, have publishing dissents to decisions to go en banc, or worse, not to go en banc, become such a necessity? The decision to take a case en banc should be an institutional decision. Yet, dissenting opinions look alarmingly like the “minority views” attached to congressional committee reports.²⁶⁵ As a political matter, a legislative minority has a constituency to please and the opportunity to get its views into the record does show those groups that the minority was active in the process and will “live to fight another day.”²⁶⁶ Are the same concerns about constituencies and “fighting another day” relevant or healthy in the judicial world where life-tenure judges are supposedly constrained by *stare decisis*? As a legal matter, what minority views generally succeed in doing is confusing readers into thinking that there is some legal significance in the losing side. Why should judges be interested in confusing the public on the state of the law? Are these the *raisons d’etre* behind a dissent from a decision not to take a case en banc? They must be intended to flag the case for the Supreme Court. I can think of no

264. One hopes that the “best” policy will be the most popular, and of course, one of the ways one can build a coalition for the “best” policy is to convince constituents to like it, which in turn, motivates their elected representatives to vote for it.

265. Separate opinions to panel decisions of all kinds, according to Chief Judge Posner, also look like “minority views,” but there is a stronger argument for them in those situations. See Posner, *supra* note 126, at 364.

266. For example, a dissent to a decision concerning en banc has the merit of partially pulling back the shroud from what could otherwise not be revealed under the rules: who voted how. Obviously, a judge probably has the right to announce his vote, although it is not easy to see why he should wish to do so. Judges have no constituencies to whom they must formally announce their views (except for Supreme Court judge-pickers, perhaps), and most law reviews would drool to have a circuit-judge written article, if the judge in question feels the need to bare his soul. The real problem is that by revealing his own vote, the judge in question unwittingly indicates how others may have voted.

other reason, except to kill even more trees than would otherwise be necessary to print the already bloated volumes of F.3d.²⁶⁷

Most legislatures tend to break down into coalitions.²⁶⁸ Sometimes these are strongly partisan, such as those operating on a parliamentary basis, and sometimes they are less so, such as in the U.S. Congress. Many observers believe coalitions develop on the Ninth Circuit as well,²⁶⁹ and to a greater or lesser extent that is fairly obviously true at least in the relatively few matters that break down on a regional or partisan basis. It may be true even more often. On a busy court, there is not enough time to have an independent understanding of every issue, so naturally, judges look for substitutes. One such substitute is a trusted colleague. On a large court where the judges have a much harder time getting to know and trust each other personally, there can be little surprise that judges substitute the understandings of judges “who think like I do,” for some of their own understandings of issues. Party affiliation is a good way to find those judges.

There is ample circumstantial evidence that this goes on—the only question is its extent. No judge nominated by a Republican president wrote or joined a written dissent from the decision to rehear the Proposition 209 case en banc, and all the members of the unanimous panel who upheld the California ban on public affirmative action were appointed by Republican presidents.²⁷⁰ All seven judges who wrote or joined a published dissent from the decision to go to en banc rehearing in

267. There is one, I suppose: helping lawyers know how to apply the en banc rules (or not, as the case generally is) so they can better sense when a suggestion for rehearing en banc would be useful. Dissents from decisions not to go en banc have almost no utility in achieving that goal, however. Where the dissent addresses the en banc rules, the dissenting judge’s interpretation is, after all, the one that did not carry the day. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir. 1997) (Schroeder, J., dissenting from decision not to take case en banc); *Compassion in Dying v. Washington*, 85 F.3d 1440, 1441–42 (9th Cir. 1996), *rev’d sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (O’Scannlain, J., dissenting from decision not to go to full court en banc). Second, most such dissents are devoted not to whether a case is appropriate for en banc rehearing under the rules, but to criticizing the panel’s decision, often written by judges who were not privy to the briefs, the oral argument, or the judges’ conference afterwards.

268. For a discussion of coalition behavior in the U.S. Congress, see Patricia A. Hurley, *Parties and Coalitions in Congress*, in *Congressional Politics*, *supra* note 262, at 113, 113–34 and the unfortunately titled, but fascinating and useful book by William F. Connelly, Jr. & John J. Pitney, Jr., *Congress’ Permanent Minority: Republicans in the U.S. House* 19–36 (1994), for an explanation of the informal and intraparty coalitions that also play a significant role in formulating policy.

269. See, e.g., Posner, *supra* note 126, at 137.

270. *Coalition for Econ. Equity*, 122 F.3d at 696 (3-0 decision with opinion by O’Scannlain, Leavy, & Kleinfeld, JJ.).

Thompson v. Calderon, a death penalty case, were Republicans.²⁷¹ In a non-en banc situation, both judges who voted to award extraordinarily high attorneys fees to lawyers litigating a “laughably easy” abortion case were Democrats, while the dissenting judge was a Republican.²⁷² Obviously, not all judges vote with members of their own party on every issue, not even all the hot-button issues. Otherwise, who could explain Judge John Noonan’s fury over the Robert Alton Harris case?²⁷³ A mere correlation between party voting does not indicate any sort of pernicious causation. Not all Republicans believe affirmative action is unconstitutional, and not all Democrats are completely sympathetic to the travails of attorneys fighting restrictions on abortion. The overwhelming majority of cases and decisions have nothing to do with partisan views. There are reasons, however, that outside observers think that the party affiliations of the judges determine many results, as they seem to do in so many high-profile cases. To the extent that the fire from which this smoke emanates may spread, the Ninth Circuit has a real problem. The lack of judicial independence it suggests, the breakdown in stare decisis, the implicit confirmation of legal realism: none of these bode well for the Ninth Circuit’s image. If they were actually descriptive of the institution, it would be alarming. If it walks like a legislature and talks like a legislature, well, it is a legislature. *Except that it is not.*

Happily, the mini-legislature disease on the Ninth Circuit is not very far advanced, but even the slightest development has damaging separation of powers implications. Splitting the circuit would help ameliorate the problem by decreasing the number of judges making decisions together, increasing the ease of their doing so, and probably making the two new institutions less reliant on staff to do work judges should be doing. To the extent that the size of the institution encourages legislative-type institutional behaviors, a split can help.

D. The Icebox Split Would Eliminate Damaging Geographic Polarization

Alaska erupted when three Ninth Circuit Californians shocked the state with the conclusion that the native corporation system of the Alaska

271. See *Thompson v. Calderon*, Nos. 95-99014, 95-99015 CV 89-3630-RG (July 28, 1997).

272. *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996) (Pregerson & Hawkins, JJ., affirming, Kozinski, J., dissenting).

273. See *supra* notes 208–12 and accompanying text.

Native Claims Settlement Act (ANCSA)²⁷⁴ did not eliminate Indian Country in Alaska.²⁷⁵ Both average Alaskans and the local lawyers who were instrumental in drafting ANCSA thought the law had done the exact opposite, and Alaskan society had been organized for the past twenty years around that assumption. After *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*,²⁷⁶ three more California judges granted an injunction to halt summer construction on an Alaskan highway project pending appeal, which had the effect of delaying the project through the entire building season.²⁷⁷ As a result, the powerful Alaska senators and representatives lost their tempers and became even more committed to a split that would wrest interpretation of the federal law that is so crucial to Alaska from Californians.

I did not know at the time whether the *Venetie* decision was correct under federal law, and the Supreme Court has since told us it was not.²⁷⁸ But at least I have been to Venetie!²⁷⁹ From the perspective of people whose entire society could conceivably be uprooted, for good or ill, the *Venetie* majority opinion is remarkably antiseptic, with no appreciation of the magnitude of what the court has done.²⁸⁰ The *Fairbanks Daily News-Miner* expressed the frustration:

274. 43 U.S.C. §§ 1601–1642 (1994).

275. *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286 (9th Cir. 1996), *rev'd*, 118 S. Ct. 948 (1998); *see also* Andrew J. Kleinfeld, *Splitting the Ninth Circuit*, Memorandum to Commission on Structural Alternatives for the Federal Courts of Appeals, May 22, 1998 (on file with author).

276. 101 F.3d 1286.

277. *Alaska Ctr. for the Env't v. Armbrister*, 131 F.3d 1285 (9th Cir. 1997). The panel consisted of judges Wallace, Norman, and Thompson. The panel ultimately permitted the Federal Highway Administration to construct the highway, but the opinion did not come down until September 2, 1997. Even though construction halted only for a few months, that was most of the Alaskan building season. It is understandable, as a result, that Alaskans feel misunderstood by their Ninth Circuit judges. *See, e.g.*, David Whitney, *House OKs Study of Ninth Circuit Split*, Anch. Daily News, June 4, 1997, at B1.

278. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998) (unanimous opinion).

279. In the interests of full disclosure, I should probably note that I was there for a total of about two minutes on a bush mail flight north of the Arctic Circle.

280. This did not go unnoticed by the concurring judge:

We have been asked to confuse matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty. We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them. They can include claims to freedom from state taxation and regulation, claims to regulate and tax for tribal

Right now the judges on this appeals court come to Alaska once a year to hear cases. Or, to be more exact, a three-judge panel comes to Alaska once a year. Under normal circumstances, a judge from the appeals court will come to Alaska about once every 10 years.

Because it is such a rare occurrence, they don't have the time to become informed and knowledgeable about the two major laws that affect Alaska and do not affect the other Western states.²⁸¹

The Alaska Native Claims Settlement Act and the Alaska National Interest Land Conservation Act [ANILCA] are among the major pieces of legislation approved by Congress in the last 30 years. These laws apply to Alaska, but not to any other state. It's a good bet that the judges making decisions regarding these laws have not read ANCSA and ANILCA or know the legislative history that puts them in context.

They rely on law clerks with little or no knowledge about the background of those laws.²⁸²

But, do not weep too hard for Alaska! Imagine how Idahoans feel; the Ninth Circuit *never* goes there!²⁸³ At least the court gets to Billings once in a blue moon.²⁸⁴ One may look at the data and conclude California is

purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land. The latter assertion would give the tribes the power to control, regulate, and tax those corporations out of existence and would provide a fruitful area for intertribal conflict. This is no imaginative parade of horrors. In the cases before us today, one tribe, Kluti Kaah, seeks sovereignty over an area as unlike Indian country as one could imagine. The other seeks sovereignty, and has been made sovereign, over a piece of the State of Alaska about as large as the State of Delaware. Furthermore, both Kluti Kaah and Venetie assured us at argument that tribes, as they see it, do have the power to tax and regulate the myriad of private corporations which received land under ANCSA.

Venetie, 101 F.3d at 1304 (Fernandez, J., concurring).

281. To be completely accurate, one should note that the Ninth Circuit hears Alaska cases in other cities on a more regular basis. *Venetie* was heard in Seattle.

282. *Twelfth Court Warranted*, Fairbanks Daily News-Miner, July 15, 1997, at A-4. Worse, they come to Alaska in July. If you have not been to Alaska when it is 30 below, you have not been to Alaska.

283. See 28 U.S.C. § 48 (1994). "Never" is too strong a word. The Court holds no regular sessions in Boise, but it did sit there to mark the 100th anniversary of Idaho statehood.

284. A panel sat in Billings once during my tenure with the court.

not over-represented on the court,²⁸⁵ but it does not help if one comes from a small state that, by virtue of being in the same circuit as California, ends up the forgotten man. As Senator Slade Gorton put it, in the Ninth Circuit, Washington is “the tail on a huge dog.”²⁸⁶ If states could get out of California’s circuit, they would get more respect simply by becoming comparatively bigger fish in a smaller pond. This, in a nutshell, is the theory driving many split backers.

“Diversity” is at the heart of many of the Ninth Circuit’s assumed strengths and weaknesses. Is the Ninth Circuit geographically and culturally diverse or is it dominated by a pernicious “California influence?” Does the Ninth Circuit bring together the breadth of legal philosophy or is it narrowly ideological? Those who idealize the Ninth Circuit’s supposed diversity are, at least with the current complement of judges, making a mountain out of a molehill. Those who claim California (read: “liberal”) judges are poisoning the court’s jurisprudence do the same thing.²⁸⁷ The better conclusion is that the Ninth Circuit is not diverse; it is polarized and that polarization correlates with a sensible circuit split.

The first myth dispelled: it is not true that the California judges are particularly “liberal,” if that is even a useful way to think about judges’ views.²⁸⁸ Consider, for instance, the party affiliation of the various judges’ appointing presidents.²⁸⁹ Of the Ninth Circuit’s twenty senior and active judges from California, nine were appointed by Democrats²⁹⁰ and

285. Fifty-five to sixty percent of appeals in the Ninth Circuit come from California, but fewer than half the judges maintain chambers in that state. See O’Scannlain, *supra* note 59, at 318; Tobias, *supra* note 41, at 589.

286. Carlsen, *supra* note 26.

287. The court’s most outspoken “liberal,” Stephen Reinhardt, is indeed a Californian, but so is the court’s most well-known “conservative,” Alex Kozinski.

288. Very few legal issues turn on party loyalties or political ideologies. More turn on “legal philosophies”: the degree of deference to be shown to factfinders and district court judges, the value of legislative history, the role of dicta, rules versus balancing tests. Admittedly, the adherents of the various sides of these jurisprudential debates often correlate with political ideologies, but that is not always true.

289. Of course, there are limits to using the party of the appointing president as a benchmark for ideology. “Conservatism” is not what it was when Richard Nixon was appointing judges, nor is it clear that he gave much consideration to ideologies anyway. Further, John F. Kennedy and Jimmy Carter’s nominees are not uniformly “liberals.”

290. Judges Arthur Alarcon, Robert Boochever (who maintained chambers in Alaska as an active judge), James R. Browning, Warren Ferguson, Dorothy Nelson, Harry Pregerson, Stephen Reinhardt, A. Wallace Tashima, and Kim Wardlaw.

nine by Republicans.²⁹¹ More relevantly, five active judges were appointed by Democrats²⁹² and four were appointed by Republicans.²⁹³ The most senior of these were appointed by Democratic presidents. In other words, as time passes, if no more judges are added to the court, the balance will shift decisively to the Republicans.

One of the reasons California has long seemed liberal is that the court added ten judges during Jimmy Carter's presidency, and seven of those went to California. The ideological effect of that increase, real or perceived, will soon be part of history, because all but two of the Carter Californians have taken senior status and the seniors are likely to have continually diminished caseloads as many have now become very senior. The future ideological makeup of the California contingent will depend much more on who the voters choose for president and the Senate majority in 2000.²⁹⁴

Another myth is that California judges somehow dominate the court. "Domination" is difficult to define, but what can be said is that California judges are not statistically over-represented in the Ninth Circuit's judging corps.²⁹⁵ More than half of the court's filings come from California, but fewer than half of the active judges and total judges hail from the state. Due largely to the Carter judges phenomenon, for many years California had the active judges with the most seniority and held the chief judge's office for what must have seemed an eternity. The influence of its senior judges, given their institutional knowledge, is still significant.²⁹⁶ Nevertheless, the Chief Judgeship has since passed to a Nevadan, en banc and court administration matters are limited to active judge participation, and as the junior judges gain seniority and its

291. Judges Ferdinand Fernandez, Alfred T. Goodwin, Cynthia Holcomb Hall, Alex Kozinski, John Noonan, Pamela Rymer, Joseph T. Sneed, David Thompson, and Clifford Wallace.

292. Judges James R. Browning, Harry Pregerson, Stephen Reinhardt, A. Wallace Tashima, and Kim Wardlaw.

293. Judges Ferdinand Fernandez, Alex Kozinski, Pamela Rymer, and David Thompson.

294. If the voters choose the same party to run both the White House and the Senate and nothing else changes, that party would take long-term dominance over the Ninth Circuit, as the circuit is owed so many judges, and the party would likely take advantage of having almost free reign to shape this large court. Further, most would go to California, as the state is now underrepresented in terms of both population and caseload.

295. See Tobias, *supra* note 41, at 589 (stating that 55% of appeals are filed in California). Eighteen of the thirty-eight ninth Circuit judges are from California, including nine of the twenty-two active judges. O'Scannlain, *supra* note 59, at 318 (estimating that 60% of court's appeals are from California).

296. Three former chief judges still on the court are from California, one of whom is still active.

accompanying confidence, the institutional leadership of now very-senior Carter Californians will wane.²⁹⁷

A final myth is that the Ninth Circuit's judging corps is richly diverse, bringing an impressive range of backgrounds and viewpoints to the court. It is unclear to what people lauding this aspect of the Ninth Circuit's perceived diversity are referring. In this multi-racial region, only two of the court's active judges are members of racial minorities.²⁹⁸ Only six are women, and three of these are the most junior judges on the court.²⁹⁹ There is not much diversity between Los Angeles and Phoenix, Portland and Seattle. None of the judges came from or now maintains chambers in what might be called a "rural" area. Only two maintain chambers in population centers of less 100,000 people.³⁰⁰ Former judges are greatly over-represented on the court compared to their incidence in the legal community as a whole, while small firm and solo practitioners are quite under-represented.³⁰¹

What diversity exists on the Ninth Circuit appears to be largely geographical. Each state in the court has at least one judge.³⁰² Eighteen judges come from California and the other twenty-one come from the following cities:

	Total	Actives
Seattle	5	2
Portland	4	2
Phoenix	4	3
Reno	2	2
Boise	2	2

297. The administrative leadership of the court has already shifted to non-Californians. Nevadan Procter Hug, Jr. is the Chief Judge, Judge Patricia Schroeder will be the next Chief Judge assuming she continues to serve on the court and realignment does not move her to another circuit, and many other internal leadership posts have shifted to non-Californians.

298. Judges Ferdinand Fernandez and A. Wallace Tashima. None of the active judges are black or latino.

299. Judges Betty Fletcher, Susan Graber, Margaret McKeown, Pamela Rymer, Patricia Schroeder, and Kim Wardlaw.

300. Judges Andrew J. Kleinfeld of Fairbanks, Alaska and Sidney Thomas of Billings, Montana.

301. For example, eight of the court's twenty-two active judges are former judges, obviously disproportional to the bar as a whole.

302. Only Hawaii lacks an active judge.

Las Vegas	1	0
Fairbanks	1	1
Honolulu	1	0
Billings	1	1

Although not perfect, the distribution is reasonable.

By comparison, the California judges are not so geographically diverse. Their state is huge, but their eighteen judges maintain chambers in just three metropolitan areas, with thirteen in the Los Angeles/Pasadena metro area alone. The *News-Miner* may have called it just right: maybe it is not California that dominates the court, but rather Los Angeles.³⁰³

What characterizes the Ninth Circuit is not diversity, but polarization. Take a look at the active judges from the southern part of the circuit. They include:

Los Angeles metro area: Fernandez, Kozinski, Pregerson, Reinhardt, Rymer, Tashima, Wardlaw

San Francisco: Browning

Phoenix: Hawkins, Schroeder, Silverman

San Diego: Thompson

Reno: Brunetti, Hug (chief judge)

Compare these to the active judges from the northwest:

Seattle: Fletcher, McKeown

Portland: Graber, O'Scannlain

Boise: Nelson (T.G.), Trott

Billings: Thomas

Fairbanks: Kleinfeld

One difference between the two lists is the size of the cities listed. In the northwest states, only Seattle counts as a "big" city by national

303. See *Twelfth Court Warranted*, *supra* note 282, at A1.

standards, and by California standards, it is pretty small.³⁰⁴ Most of the northwestern judges primarily practiced law during their former careers, and all but Judge Margaret McKeown, Judge Susan Graber, and Judge Stephen Trott did so in small to medium sized firms, which means they struggled to meet the proverbial payroll, just like any other small businessperson in town. Judges Thomas G. Nelson, Andrew J. Kleinfeld, and Sidney Thomas were all general practitioners; Judge Trott was a prosecutor; Judge O'Scannlain primarily represented utilities firms; Judge McKeown did large firm practice; Judge Graber spent most of her career on the appellate bench; and Judge Kleinfeld was a federal district judge for several years. Like most small city lawyers, they got to know the local courtrooms well. The northwestern judges became not just community, but statewide leaders.³⁰⁵ These are the profiles you would expect of northwestern judges, given the types of communities from which they come: small city types, community leaders, legal generalists, small businesspeople. Mixing the smaller city private practitioners with the handful of other backgrounds creates an attractively diverse and comparatively representative bench.

The profile in the southern part of the circuit is quite different. Eleven of the south's fourteen active judges maintain chambers in three of the nation's largest metropolitan areas, Los Angeles, San Francisco, and Phoenix, although there are plenty of smaller communities in that part of the circuit. Many of the judges in the southern part of the circuit practiced law, but they logged more time on average in large firms or in government service, with the difference in the culture of law practice that implies.³⁰⁶ Many, such as Judges Pregerson, Fernandez, Rymer, Tashima, Silverman, and Wardlaw were judges at either the state or federal levels for many years before joining the Ninth Circuit.³⁰⁷ Others, such as Judges

304. Seattle is no more than a regional legal center, and its importance as a population and cultural center may well be a passing fad.

305. Judges T.G. Nelson and Andrew Kleinfeld are both former state bar presidents. Judge Fletcher is a former Seattle/King County bar president and Washington state bar governor. Only Judge Trott did not spend most of his career in the town where he now maintains his chambers. Prior to going on the bench, Judge Trott served as a U.S. Attorney in California. Judge McKeown worked in a large Seattle law firm, although she did spend some years in Washington, D.C.

306. Big firm lawyers do not regularly bicker over a few dollars of child support, nor do they negotiate many drunk driving pleas. Moreover, large law firms are by definition large institutions, and therefore more bureaucratic.

307. To be completely accurate, Judge Wardlaw actually served only 25 months as a district judge. Henry Weinstein, *L.A. Judge Confirmed to 9th Circuit Post Judiciary*, L.A. Times, Aug. 1, 1998, at A18. By contrast, only Judge Andrew J. Kleinfeld and Judge Susan Graber from the

Browning and Schroeder, spent lengthy periods in government service.³⁰⁸ The south boasts more national law schools from which top academics can attract the attention necessary to be picked for the court.³⁰⁹ With a few exceptions, fewer of the southern judges' biographies include the mainstream city and statewide professional and public leadership experiences that are *de rigeur* for their northern colleagues,³¹⁰ but of course, that is to be expected. Ninth Circuit judges in the northwest may be big fish in their local communities, but no matter how big a fish one is, it is tough to be a big fish in Los Angeles, let alone California. Big fish in Los Angeles want to be governor or president, not Ninth Circuit judges. Unlike many of their northern colleagues, most of the southern Ninth Circuit judges are anonymous in the California cities whence they come.

Who knows what are the ideal qualifications for a Ninth Circuit judge? It is impossible to say whether the northwestern or southwestern profile is preferable. It is a matter of taste. All this discussion suggests that the communities, and specifically the legal communities from which the two regions' judges come, are different.

Why the two legal communities are different is worthy of attention. Obviously, these two groups of judges are not internally homogeneous. The Reno judges, for example, would fit better with the Boise or Portland judges than with the army from Los Angeles. The point, however, is that there are more cultural differences between the north and the south and between the northern judges and southern judges than a few feet of snow or a grove of palm trees. The differences probably have much to do with the make-up of the groups from which judges are picked in these geographical areas (and are therefore not a mere accident of court's current composition) because the groups from which these

northwest were judges prior to joining the Ninth Circuit, and Judge Kleinfeld's tenure as a U.S. district judge was considerably shorter than the period he spent as a private practitioner, although he did serve many years as a part-time magistrate.

308. Among the northwest judges, Judge Stephen Trott was a U.S. Attorney, and Judge Diarmuid O'Scannlain spent a few years in government positions.

309. The court's academics are now senior judges, but if Professor William Fletcher from Berkeley (one of President Clinton's nominees to court) is ultimately confirmed, he would be the court's most recent active academic.

310. This is not to say that the southern judges are not involved in their local communities and in state and national legal organizations. Far from it. There is a difference, however, between being a state bar president and holding a leadership position in a less prominent and more specialized group. Both are important, but they must have a different impact on the holder's view of himself and his role in the community.

judges are picked reflect enduring differences in the regions' legal culture.³¹¹ What attracts the attention of judge pickers in the two regions is different and as a result the circuit's southern judges are more likely to be big-city, big-institution judges, while northern judges are not.³¹² This is not a description of diversity; this is polarization, and it is probably a fact of life in this huge circuit where the largest communities are in the south.³¹³

Regional polarization is not one of the Ninth Circuit's healthier attributes, particularly since at present it has the unhappy accident of correlating with party backgrounds, thereby taking on an ideological taint.³¹⁴ It is not good when an "us against them" mentality emerges among the citizens of the Ninth Circuit states, even if the judges themselves do not necessarily view it that way. It is worse when that mentality is reinforced by the culture of the court. The perceived, or possibly even real, specter of a powerful region dictating to a "misunderstood minority" breeds a distressing discontent which, if unchecked, could be damning to the court's legitimacy.

Many court watchers have taken Senators Burns and Gorton's comments that they want out from under the thumb of California judges

311. Where, for example, are the big firm lawyers in Idaho, Montana, and Alaska needed to diversify the backgrounds of the northern judges?

312. Almost any lawyer politically active in the correct party, who is also well respected for cerebrality, has had a highly decorated career in one of a variety of acceptable career paths, and is over age 40, is a realistic candidate for Ninth Circuit service. Given the number of possible candidates, I suspect that it is difficult to hone the potential judge list from California to a manageable size, which is probably why there are so many former state and federal judges on the court; an easy way to distinguish oneself as a potentially good judge is to have been one already. By contrast, it is fairly obvious how the President's judge pickers identify candidates from the northern states: they look at lists of the most well respected lawyers in the one or two largest cities in the state in question, then eliminate those who are not active in the correct party. Such a list would be manageable to use as a database for choosing nominees.

313. The largest cities are in the south, so the differences in the available judge candidates are different in the south than the north.

314. Seven of President Carter's 13 appointments went to California, so until very recently, California simply has not been in line for many new judges. (Judge Boochever, a Carter appointee from Alaska, moved to California for medical reasons upon taking senior status, adding to the California contingent, and giving Alaska senators a compelling argument for a new judge in their state during the Bush administration). Republican presidents had the opportunity to make most of the Northwest's appointments, although President Clinton has recently made two. Bear in mind that the Northwest's judges would have been fairly "conservative" regardless of which president made the appointments, because a state's senior senator plays a large role in choosing judges from his state, and the senior senators from the northwest have mostly been Republicans during this period. Ideological polarization need not necessarily correlate with geography, however.

whose thinking is “a little bit different”³¹⁵ and assumed that those senators’ only thought is to be in a circuit with judges who conform with the northwest’s views on the death penalty, gun control, and the environment.³¹⁶ While that characterization may speak for some split backers, it is an unfairly narrow characterization of complicated impressions that manifest themselves in California domination rhetoric. First, northwestern opinion is not exactly lockstep on these issues, nor is southwestern opinion.³¹⁷ Second, Burns and Gorton’s concerns ring true: in a region where federal law has a particularly profound effect on people’s daily lives, a federal court culture demonstrably different from and sometimes at odds with theirs has the power to overwhelm them at any time with the stroke of a pen. The concern may look narrowly political, but it has broader roots, and even if those roots turn out not to be planted in fertile soil, the flowers that grow from them are not pretty.

Moreover, geographical polarization suggests that severing the icebox states from the Ninth Circuit would have more than a mere “political” effect on outcomes. Only in law review articles does the legal culture of which the judge was a part while practicing not affect her view of a case, particularly if the judge is “of” the local community, as are most of the Ninth Circuit’s judges.³¹⁸ Other items on a judge’s resume count too. Judge Stephen Trott’s firm lecture to prosecutors about the dangers of using paid confidential informants as undercover agents sends a particularly strong message both to practitioners and other judges, precisely because he spent a long and successful career as a prosecutor before going on the bench.³¹⁹ It is a good example of how legal culture and a judge’s background can influence opinions in a constructive way. In so many cases, ideas about standards of review, trust in district judges,

315. Roy L. Brooks, *Reforming the Judiciary: Should Federal Courts More Reflect Regional Interests?*, San Diego Union Trib., Nov. 19, 1995, at G3.

316. *See id.*

317. *Compare, e.g.,* Compassion in Dying v. Washington, 79 F.3d 790, 837–38 (9th Cir. 1996) (en banc) (determining right to assisted suicide is *benefit* to terminally ill and thus lawful), *rev’d sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997), with Lee v. Oregon, 891 F. Supp. 1429 (D. Or. 1995) (finding right to assisted suicide is *burden* to terminally ill and thus unlawful).

318. A few are not. Judge Stephen Trott is not an Idahoan and Judge Robert Boochever is not a Californian. For a discussion of this issue, see Carol Ostrom, *Fuming Senators Ready to Carve up Ninth Circuit*, Seattle Times, Nov. 2, 1997, at A1.

319. United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993). In light of this opinion by a successful former prosecutor, it is much harder for prosecutors to argue to judges, who might otherwise have little knowledge of these things, that it is not possible to get a conviction without paid confidential informants.

faith in the adversary process, and concreteness versus abstraction in the law have as much to do with outcomes as how a judge parses a statute or synthesizes several cases. These differences in philosophy are related to differences in backgrounds.

The court's en banc decision in *United States v. Perez*³²⁰ provides an example of the differences background can make. All eleven judges agreed that the plain error in this criminal case was one that the court should not correct, but they divided six to five over why. The majority struggled with the jurisprudential difference between "waived" and "forfeited" error in recent Supreme Court precedent.³²¹ The concurring minority made an impassioned plea for the court to allow "defense counsel leeway to manage their cases as they and their clients think best,"³²² within the moral constraint that "it is wrong for the defense to ask a trial judge to do something, and then ask an appellate court to reverse because the trial judge did what was requested."³²³

The majority opinion by Judge A. Wallace Tashima analyzes the case in this tone:

In [*United States v. Olano*], the [Supreme] Court provides an extensive framework for plain error review. . . . *Olano* does not, however, specifically address the concept of invited error. From this omission, the panel concluded that plain error review is appropriate for invited errors. . . . Although *Olano* does not directly address so-called "invited error," it certainly addresses the difference between forfeited and waived rights. . . . Accordingly, we cannot agree that *Olano* completely overruled our invited error doctrine. Instead we must reformulate that doctrine to conform to *Olano*'s discussion of waiver and forfeiture.

Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. . . . We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. . . . If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.³²⁴

320. 116 F.3d 840 (9th Cir. 1996).

321. *Id.* at 845–46.

322. *Id.* at 852 (Kleinfeld, J., concurring).

323. *Id.* at 853 (Kleinfeld, J., concurring).

324. *Id.* at 844–45.

Contrast the style and emphasis with this from the concurrence by Judge Andrew J. Kleinfeld:

Lawyers do not research every possible issue of law in every case. Nor should they. A lawyer necessarily and properly exercises professional judgment about how to allocate the limited time for preparation in a way likely to produce the most benefit for the client. These time allocation decisions are by logical necessity made in partial or complete ignorance of what would be accomplished if time were allocated differently. Sometimes researching the law is a waste of time, while finding and talking to a witness would produce a defense bonanza. Often there is not enough time to do both the maximum possible extent. Experienced lawyers usually know what they are doing and are acting wisely for their clients, when they make their decisions about what to do, and what need not be done, to prepare the case.³²⁵

Which of these styles one prefers is largely a matter of taste, but not surprisingly, all the members of the concurring minority had spent long careers in the general practice of law, clocking many hours in local courtrooms on the other side of the bench.³²⁶ All but one practiced in some of the smallest communities represented on the court. In the majority were two judges who had each spent thirty-five years on the appellate bench,³²⁷ two who had spent eighteen years or more as Ninth Circuit judges,³²⁸ two long-time trial judges,³²⁹ and a lifelong academician.³³⁰ All but one of the majority were from the largest cities in the circuit.³³¹ One case doth not broad principles make, but it seems foolhardy to suggest that such differences in background and attitudes do not produce opinions of a different tones, if not different results.

325. *Id.* at 851 (Kleinfeld, J., concurring).

326. They are Judges Procter Hug, Jr. (Reno), Andrew J. Kleinfeld (Fairbanks), Thomas G. Nelson (Boise), David Thompson, (San Diego), and Stephen Trott (Boise).

327. Judges James R. Browning and Edward Leavy.

328. Judges James R. Browning and Harry Pregerson.

329. Judges Harry Pregerson and A. Wallace Tashima.

330. Judge John T. Noonan.

331. These differences are not completely regional. All the concurring judges are not from the northwest, and all the judges in the majority are not from the southern part of the circuit. In fact, in the spirit of our current fascination with diversity, it is a relief to discover that this attitudinal polarization does not completely correlate with geography.

Split critics argue that dividing the circuit to isolate the north-south attitudes into different circuits would do violence to the federalizing aspect of the circuit courts.³³² Circuit reorganization is about making trade-offs, however, and the relative merits of “federalization” maintained by a bloated circuit court of appeals are elusive in this case. First, in the icebox scheme, each of the new circuits would have at least three states. The several eastern circuits with only three states seem to have managed rippingly without more, and they also seem to have maintained a sufficiently consistent intercircuit law to support commerce and region-wide activity.³³³ Second, federalization is not the concern it was when the only federal presence for miles around might be a post office. Federal institutions, with their ubiquitous local offices, abound. We now look to Washington, D.C. to solve many of our problems, and Congress has responded with innumerable federal laws.³³⁴ We are closer and more connected than ever before. The trend is such that it is arguably more federalism, not federalization, that we need. Finally, the icebox split is not a proposal to create the federalization proponents’ nightmare—twenty circuits with only nine or ten judges each.³³⁵ All the Ninth Circuit split would do is increase the number of regional circuits from eleven to twelve. It is hard to see the damage to federalization in this scenario.

Further, while the northern states have good reason to take a special interest in federal law, as it has such a huge impact on their daily lives and the fabric of their societies, they do not all have the same concerns. Yuppies in Seattle, Mormons in Idaho, struggling logging communities in eastern Oregon, native corporations in Alaska, ranchers in Montana: only those to whom all of these groups are foreign could see them as monolithic or homogeneous, either culturally or in their legal concerns. The Twelfth Circuit would make a significant and perhaps bigger contribution as a unifying force for these diverse groups than the current Ninth Circuit, because the Twelfth would not have the stigma of being “California’s court.”

“Federalization” seems like a noble value in high-minded public policy debates, but it can be quite destructive to national loyalties when

332. See Baker, *supra* note 2, at 97; Hellman, *supra* note 31, at 282–85.

333. Burns, *supra* note 40, at 254.

334. On this point and its impact on the federal judiciary, see generally Wilkinson, *supra* note 105, at 1149–57.

335. See, e.g., Baker, *supra* note 2, at 72–73; Tobias, *supra* note 41, at 591 & n.64.

one region begins to chafe under a yoke tightened by another. In fact, the split might have a hitherto undiscussed positive effect on Californians and California judges in particular. A court consisting of two or more regions has the potential for domination, or perceived domination, by one region over the other. The perception of domination can work both ways. Californians and California judges may have some of the same domination concerns about northwestern judges that the northwestern senators express about Californians. If federalization comes at the price of suspicion and perceived domination of either group by the other, the marginal value of the federalization achievable by keeping the Ninth Circuit together may not be worth it.

Moreover, those who fear the split because it will change their preferred interpretations of federal law³³⁶ should take heart, and to those who back the split in order to make federal law conform with local preferences, I say: look again. History teaches that federal judges are perfectly capable of determining and enforcing whatever the true spirit of federal law, even when that spirit does not comport with their neighbors' political hopes.³³⁷ How else could the Fourth and the old Fifth Circuits have become such leaders in civil rights law?³³⁸ Those efforts in the southeast were touch and go during the 1950s, '60s, and '70s, but they would not have been any easier if judges from Massachusetts or New York had been brought in to adjudicate civil rights disputes. Yet, that is precisely what the Ninth Circuit does when it sends three Californians to interpret ANCSA for Alaskans or three northwesterners to measure Proposition 209 against the U.S. Constitution for Californians. Many more like the ANCSA episode and the Ninth Circuit's "federalizing" influence will not be able to repair the damage.

Federalization is a useful value and an important purpose for the federal courts, but it is unclear how much it is worth in light of the many other concerns about the court's current size and structure. Arguments about diversity and federalization are at best of minimal concern, and at worst are red herrings. The current Ninth Circuit is marked more by

336. See, e.g., Carl Tobias, *The Proposal to Split the Ninth Circuit*, 20 Harv. Envtl. L. Rev. 547 (1996).

337. See, e.g., J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (1961); J. Harvie Wilkinson III, *From Brown to Baake: The Supreme Court and School Integration: 1954-1978* (1979).

338. See, e.g., Jack Bass, *Unlikely Heroes* (1981); Peltason, *supra* note 337; Wilkinson, *supra* note 337. In fact, its swollen civil rights docket prompted the Fifth Circuit split debate in the 1970s. See Baker, *supra* note 2, at 59.

polarization than by diversity, and it makes sense to isolate the poles so they quit bumping heads. The icebox split would also retain ample federalizing influence over the region by reinforcing confidence in the institution of the federal courts.³³⁹

IV. OTHER ARGUMENTS AGAINST THE SPLIT ARE UNPERSUASIVE

The best defense is the best offense. The best arguments against the split lose their force when one grasps a good understanding of the Ninth Circuit's problems and their relationship to the circuit's size and composition. Nevertheless, in the spirit of the wise politician's motto, "leave no shot unanswered,"³⁴⁰ there is value in examining the few remaining arguments against splitting the circuit to demonstrate their lack of persuasive force.

A. *The Split is Merely a Politically Motivated Attempt to Change the Law in the Northwest*

Response: Everything Congress does is "politically motivated." That is the way the system works. As Professor Thomas Baker has pointed out, "[u]ltimately, federal jurisdiction is about politics."³⁴¹ Instead of worrying too much about why politicians do things, maybe the rest of the legal community should figure out whether the split would be a good idea and take advantage of the political climate if it is. The "political motivation" argument against a split is unpersuasive because there is nothing inherently wrong with such a motivation.

Perhaps some northwestern lawmakers want a Twelfth Circuit that will interpret the law differently than the current Ninth Circuit.³⁴² This view is not necessarily wrong. There is very little federal common law, most federal law is statutory, and Congress wrote the statutes. That Congress should take some interest in how judges interpret their work product is not surprising. If Congress wants to use a tool with the precision and efficiency of a meat cleaver to change how its statutes are

339. Unlike many of the other split structures proposed, the icebox split has the merit of maintaining a federalizing influence in the new Ninth as well, with three states serving as a counterweight to California.

340. Christopher Matthews, *Hardball* 117–30 (1990).

341. See Baker, *supra* note 2, at 85.

342. See *id.* at 100–01.

interpreted, this is one of the tools the Constitution provides.³⁴³ On the other hand, one instinctively recoils at the notion of Congress controlling the outcomes of court cases by tinkering with circuit boundaries. It flies in the face of our notions of an independent judiciary.

The “politicization” criticism has merit only if the new Twelfth Circuit actually would interpret the law differently from the old Ninth. Were the two circuits to produce different interpretations of the law, it would probably reflect underlying jurisprudential differences among substantial groups of judges masked by an accident of geography, which does not seem likely. Nevertheless, to argue that the circuit should not be split in order to avoid such different interpretations is simply an argument for maintenance of the legal status quo and the legal predictability that would follow. On the other hand, if the circuit were split and the new Ninth and new Twelfth interpreted the law differently, the two circuits would produce intercircuit conflicts that would highlight the interpretive differences and therefore permit the appropriate legal bodies to announce the “correct” interpretation. Predictability is an important value, but maybe one of the reasons Congress is increasingly interested in splitting the circuit is that it thinks the Ninth Circuit is getting it predictably wrong.³⁴⁴ Unlike the circuit courts, the U.S. Supreme Court is not exactly overworked.³⁴⁵ If the split would create additional intercircuit conflicts, perhaps the Supreme Court needs to take these cases and resolve the differences, Congress needs to amend the law to be more clear, or the circuits need to keep struggling with these issues.³⁴⁶ In any event, exposing differences is hardly a bad thing in principle.³⁴⁷

343. See U.S. Const. art. III. Would it be better if Congress shut off the appropriations faucet to the U.S. courts? Would it be better if the executive branch refused to enforce court decisions? Of course not. If Congress is really concerned with how the Ninth Circuit interprets its decisions, it can do any of the following: amend the statutes, which the Ninth Circuit might still interpret “incorrectly;” alter the structure or jurisdiction of the court to force out decisions more of Congress’s liking; refuse to confirm nominees viewed as “untrustworthy;” or take one of the even more invasive means described above. Splitting the circuit does not sound very intrusive in that context.

344. The reversal rate does not inspire confidence. See Carlsen, *supra* note 26.

345. See Posner, *supra* note 126, at 141–42.

346. It is not enough to argue that the Supreme Court will not take so many cases. Perhaps the Supreme Court needs to see these intercircuit conflicts in sharper relief. Further, even if the Supreme Court does not want to take on more work, that is not a reason to subject the people of the potential Twelfth Circuit states to less satisfactory jurisprudence and judicial administration.

347. See *Letter from Justice Anthony Kennedy*, *supra* note 34, at 3 (stating that Supreme Court welcomes intercircuit conflict as instructive). In fact, a 1986 New York University study argued persuasively that deep intercircuit conflict was useful for the purpose of framing issues for the

My own view is that this discussion is academic. Splitting the circuit would not change the law much, and therefore, opposing the split on the ground that a split would change the law is a red herring. The judges do agree on most cases. There are fewer controversies on the court than one might think.

Split opponents believe they have the moral high ground, but they forget that trying to control the state of the law by controlling circuit boundaries is judicial gerrymandering whether one is trying to change those boundaries or whether one is trying to maintain the status quo. It is not surprising that issue-oriented groups, such as environmentalists, are in the forefront of the opposition to splitting the Ninth Circuit, just as timber interests drool over the prospect of split legislation.³⁴⁸ From the perspective of those who believe the fate of the spotted owl in Oregon or Indian country in Alaska lies in the hands of judges from California and Arizona, those states must be kept together in one circuit at all costs.³⁴⁹ Nevertheless, more detached observers must find a poverty to a debate over circuit splitting driven by the bottom line in a few cases. In such a debate, neither side has the market cornered on integrity.

B. The Icebox Split Will Simply Leave a Large Circuit with the Same Problems It Purports to Solve

Response: Some argue that the icebox split will leave a large circuit with many of the same problems the split purports to solve. This is a fair criticism. The Icebox Circuit is not a complete solution to the Ninth Circuit's ills. It cannot be. The Ninth Circuit faces some problems, such as overwhelming filings, that a split alone just cannot solve. Further, the Ninth Circuit that will remain after the northwestern states are cut away will be very large. If fully staffing it becomes part of the deal, it could quickly grow in judgeships to the approximate size of the understaffed current Ninth. All the old problems of workload, collegiality, and possibly polarization will be back in force.

A complete solution may not be necessary right now, however. Merely delaying a crisis can sometimes avert it. Who knows what ten or

Supreme Court to solve once and for all for the whole country. Seth Estreicher & John Sexton, *Redefining the Supreme Court's Role: The Federal Judicial Process* (1986).

348. See Tobias, *supra* note 35, at 1374; see also Valerie Alvord, *Bid to Split 9th Circuit Will Have Its Day in Court*, San Diego Union Trib., Feb. 24, 1996, at A21.

349. See Tobias, *supra* note 336, at 547.

twenty years will bring to the U.S. courts? The entire supply and demand curve for justice may shift. We may have a national court of appeals. Congress may pass new laws limiting the federal courts' substantive jurisdiction. Congress may also develop a taste for splitting states to split circuits, and carve up the new Ninth Circuit as it did the old. Twenty years from now, the "litigious society" may be a thing of the past, and young lawyers may be standing in bread lines. It would be silly to split the Ninth Circuit if that can only be a short-term solution; but, if it would improve the administration of justice in the northwestern states now without damaging the possibility of a more extensive solution later, it is sensible to split the circuit. The icebox split achieves this goal.

C. *Why Not Wait for the More Extensive Solution, Especially if It Involves Amalgamation of the Courts of Appeals or Division of Judges on Some Other Basis?*

Response: As a practical political matter, Congress has no stomach for nationwide realignment of the circuits or some other global solution.³⁵⁰ Even if that would be the best thing for our appellate court system, it is not going to happen any time soon.

Nor is it clear that a global suggestion is necessary. For twenty years study commissions and jurists have warned that the sky is falling on our circuit courts of appeals; yet, they have survived remarkably well.³⁵¹ If the northwest states have problems that a sensible split could solve, those states deserve at least a partial answer soon. Perhaps the Icebox Circuit is it. Putting problems on hold until the elusive day when the need for a global solution is apparent and the entire nation can agree on one is unfair. Further, the idea that we should try every other possible idea for reform before splitting the circuit sounds too much like a "save the Ninth at all costs" sort of argument that lacks persuasive force.³⁵²

350. The Federal Courts Study Committee released a report in 1990 "stating without endorsement" a number of alternate structural changes to the appellate courts including complete realignment into smaller circuits, a national court of appeals, subject matter courts, a centralized court of appeals, and consolidations of the current circuits. See Baker, *supra* note 2, at 42-43; Joseph Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 St. Louis U. L.J. 455 (1995). None of these proposals went anywhere in Congress.

351. See Baker, *supra* note 2, at 32-43.

352. Chief Judge Hug has argued that Congress should consider changing the jurisdiction of the federal courts or just the appellate courts to stem the tide of filings. Hug, *supra* note 30, at 293. Chief Judge Hug's ideas make a lot of sense, but they must be viewed as more intrusive than splitting the Ninth Circuit. A split should probably be tried first.

One of the hardest things about making any decision is that no matter how careful one is to “keep all options open,” he necessarily closes some doors behind himself. The icebox split has the merit of keeping the door open to other splits or realignments in the future, because the Icebox Circuit is the type of circuit structure one might choose if one were starting from scratch. At some point, however, any change in circuit boundaries closes or partially closes the door to some other change. Closing the door on amalgamation is not much of a price to pay for a sensible circuit now. Amalgamation would exacerbate many of the problems discussed in this Article. At some point, Congress needs to decide that certain types of answers—amalgamation for example—are no answers, at least in the near term. If splitting the Ninth Circuit is a step toward making that choice, then Congress should split the circuit.

D. Ninth Circuit Judges and the Ninth Circuit Bar Oppose Splitting the Circuit

Response: Until recently, Ninth Circuit judges were unwilling to back a split publicly.³⁵³ Perhaps there is concern that supporting the split is an implicit criticism of a past or the sitting Chief Judge.³⁵⁴ Those days are over. Active Judges Diarmuid O’Scainnlain,³⁵⁵ Andrew J. Kleinfeld,³⁵⁶ Stephen Trott,³⁵⁷ and Thomas Nelson,³⁵⁸ and senior Judges Joseph Sneed³⁵⁹ and Eugene Wright³⁶⁰ have all gone on the record as favoring a

353. In fact, Senator Gorton stated of one of his split bills that “this bill has been taken personally by the Ninth Circuit hierarchy—God bless their souls—who has [sic] set out to defeat this bill and protect their power base.” Tobias, *supra* note 35, at 1375 (1995) (quoting Senator Gorton).

354. Senator Burns takes an ungenerous view, claiming split opposition “curries favor” with the Chief Judge. Burns, *supra* note 40, at 256 n.45.

355. O’Scainnlain, *supra* note 95, at 948 (“That choice is, essentially, whether to encourage further growth of the Ninth Circuit, impliedly promoting an amalgamation of the circuits into a lesser number of circuits with larger courts of appeals, or to continue to restructure circuits into more manageable regional entities. . . . I support the latter option.”); see also *Joint Statement*, *supra* note 127.

356. Donnelly, *supra* note 24, at B9 (“[W]e have become a laughingstock. It’s not because we have bad judges; it’s because the circuit is too large and has too many cases.”) (quoting Judge Kleinfeld).

357. *Joint Statement*, *supra* note 127.

358. *Id.*

359. *Statement of Joseph T. Sneed III to the Commission on Structural Alternatives for the Federal Courts of Appeals* (visited July 24, 1998) <<http://app.comm.uscourts.gov/hearings/sanfran/0529SNEE.htm>>.

360. *Joint Statement*, *supra* note 127.

sensible split. Judge Sidney Thomas backed a split as a practitioner, although his view has changed since he joined the court.³⁶¹ All but Judge Sneed hail from what would be the Icebox Circuit.

Further, stating that the Ninth Circuit bar opposes the split³⁶² minimizes the amount of support that exists for the project. Ninth Circuit lawyers are notorious for speaking privately about their dissatisfaction with the circuit, but refusing to go on record with those thoughts.³⁶³ Legal uncertainty also encourages litigation, which is sometimes good for attorneys, but is almost never good for their clients.³⁶⁴ Interestingly, the state attorneys general of seven of the states in the Ninth Circuit back the split.³⁶⁵

A number of jurists outside the Ninth Circuit seem to back a sensible split. Former Supreme Court Chief Justice Warren Burger has urged Congress to split the circuit because he believes the limited en banc procedure is fundamentally flawed.³⁶⁶ Current Supreme Court Justice Anthony Kennedy, a former Ninth Circuit judge, told Congress in April 1997 that the court is “too large to have the discipline and control that’s necessary for an effective circuit.”³⁶⁷ According to Supreme Court Justice Sandra Day O’Connor, “the circuit is simply too large” and “some division or restructuring of the Ninth Circuit seems appropriate and desirable.”³⁶⁸ Leaders of other appellate courts do not agree that the usual Ninth Circuit judge’s favorite panacea for the court’s ills—more judges—will help solve the circuit’s problems.³⁶⁹

361. *Prospective Judge Endorses Splitting 9th Circuit*, Assoc. Press Pol. Serv., June 29, 1995, available in 1995 WL 6733564 (“In the past I’ve served on a Montana State Bar committee examining the question. . . . At that time, in 1989, I was in the minority in being in favor of splitting the circuits.”). Judge Thomas’s position has changed since he joined the Court. See *Statement of Sidney R. Thomas to the Commission on Structural Alternatives for the Federal Courts of Appeals* (visited July 24, 1998) <<http://app.comm.uscourts.gov/hearings/seattle/0527TH00.htm>>.

362. See, e.g., Procter Hug, Jr., *The Ninth Circuit Functions Well and Should Not Be Divided* 5 Ninth Circuit Document (1998) (visited July 14, 1998) <<http://www.ce9.uscourts.gov/web/OCE>>.

363. Carrington, *supra* note 156, at 210; Posner, *supra* note 126, at 137.

364. Burns, *supra* note 40, at 256.

365. *Id.*

366. See Baker, *supra* note 2, at 80.

367. Dave Hogan, *Will the Ninth Circuit Remain Unbroken?*, Oregonian, Aug. 17, 1997, at A1.

368. *Letter from Justice Sandra Day O’Connor to Justice Byron R. White*, June 23, 1998 (visited Sept. 24, 1998) <<http://app.comm.uscourts.gov/hearings/submitted/pdf/oconnor.pdf>>.

369. See, e.g., Posner, *supra* note 126, at 124–59 (current Seventh Circuit Chief Judge); Tjoflat, *supra* note 122, at 70 (former Eleventh Circuit Chief Judge); Wilkinson, *supra* note 105, at 1164–78 (current Fourth Circuit Chief Judge).

Finally, many of the northwestern states' senators support the split along with many other elected officials. In fact, it sometimes seems that the noisiest opposition to the split comes from California judges and congressmen.³⁷⁰ That is understandable, but it is not a reason for anyone else to oppose the split.

E. The Size of the Ninth Circuit Permits Useful Experimentation with the Administrative Techniques for Large Circuits

Response: Our circuit courts of appeals are growing by historical standards and the size of the Ninth Circuit in the past twenty years has provided a forum to experiment with efficiency techniques in court administration that, in many cases, worked.³⁷¹ The information gleaned from these experiments will be useful in the future, and it will be unfortunate, to some extent, to lose this forum for experimentation.³⁷²

Policymakers have to put things in perspective, however. Is the opportunity for experimentation in the Ninth Circuit more important than the administration of justice and the legitimacy of the U.S. courts in the northwest? Surely not. Further, the Ninth Circuit that will remain after the split is not exactly miniature. It will still be useful as a laboratory for future innovation.

F. The Start Up Costs Could Be Considerable, Including Money for New Buildings

Response: One need not look cavalierly at a potential sixty million dollar bill to the taxpayers, which is the amount some estimates suggest would be needed in start-up costs for a new Twelfth Circuit, to support the icebox split.³⁷³ If the problems outlined above with the current Ninth Circuit are real, and a new Twelfth Circuit of the icebox states is the solution, then let us hope that Congress will not balk solely due to the cost, being "pennywise, but pound foolish."

The split can be achieved in a cost effective manner. Eventually, most who oppose the circuit split raise issues such as new buildings, new staff

370. See, e.g., Whitney, *supra* note 25.

371. See Baker, *supra* note 2, at 82.

372. Tobias, *supra* note 41, at 594.

373. Burns, *supra* note 40, at 255.

and staff training as high costs of splitting the circuit.³⁷⁴ It is possible to minimize those costs. The new Twelfth Circuit would be a relatively small circuit of less than ten judges, so even if all the judges were sitting on various panels at once with a couple of seniors, the maximum number of panels that could sit at one time would probably be four. Therefore, if the court mostly divided its sittings between Portland and Seattle, which already host Ninth Circuit panels on a regular basis, the court would have plenty of courtrooms and visiting office space for judges.³⁷⁵ Huge new courthouses are unnecessary.

As for central staff, even if no staff came from the old Ninth Circuit, a relatively small amount of staff resources would be needed to support an eight or nine judge circuit. Further, fewer staff might be necessary on a per capita basis as well. After all, filings per judge are fewer in the icebox states than in the southern states.³⁷⁶ The sizable staff devoted to monitoring inconsistencies between panels would be partially expendable, because the volume problems that produce those inconsistency concerns would not exist. Many administrative jobs would be less complex because there would be fewer people to coordinate. It is conceivable that the Twelfth Circuit could cut out a layer of management or whole sections of staff without which the current Ninth could not survive.³⁷⁷

V. CONCLUSION

Hopefully, when the Commission on Structural Alternatives for the Federal Courts of Appeals makes its final report to Congress in December 1998, it will emphasize even more vehemently the many positive aspects of separating the icebox states from the rest of the Ninth Circuit. The icebox states and the rest of the Ninth Circuit each constitute definable regions which should have their own courts of appeals.

374. See Baker, *supra* note 2, at 90; Hug, *supra* note 30, at 308; Tobias, *supra* note 35, at 1382-83.

375. *Joint Statement*, *supra* note 127, at 10.

376. *Judicial Business*, *supra* note 88.

377. See Drucker, *supra* note 129, at 638-40. Currently the Ninth Circuit's legal and administrative staff is organized into departments such as death penalties, motions and screening, and inventory, with deputy clerks or other high level managers overseeing those operations. There are other departments, such as the circuit executive's office, that are necessary due to the circuit's size and workload. Those departments are large on the Ninth Circuit due to its size, and managers supervise many employees.

Splitting the Ninth Circuit by creating the Icebox Circuit would significantly decrease workload and administrative burdens in both courts, improve collegiality in both circuits, and eliminate the geographical polarization currently marring the Ninth Circuit's work. The icebox split is the best available intermediate-term solution to the Ninth Circuit's ills. The Commission has "almost" recommended an icebox split for many of the reasons discussed in this Article. For that reason, the icebox cometh.

